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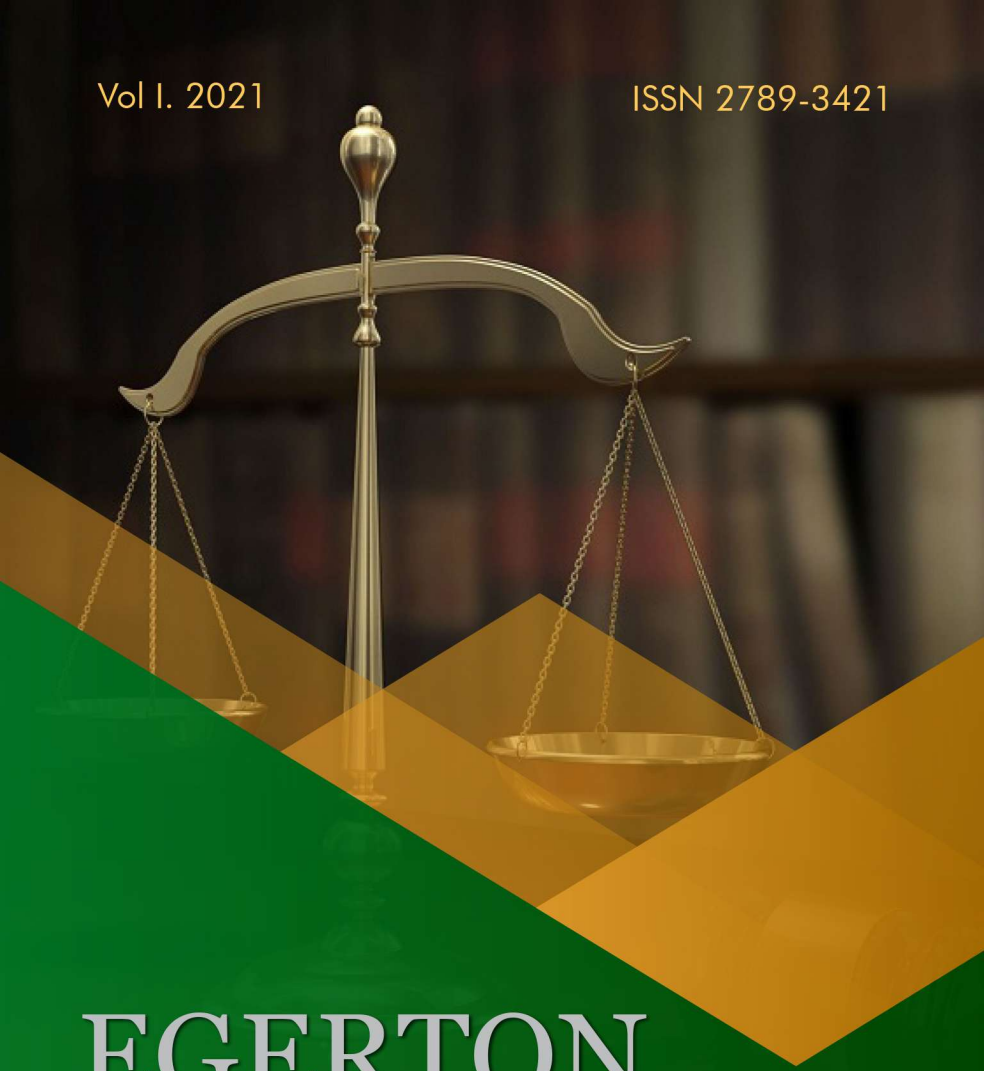

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Preface

Access to justice is a basic principle of the rule of law and component of justice. It is a right guaranteed under international instruments and the Constitution of Kenya. Accessing justice is complex and can be difficult especially for the vulnerable and marginalized members in the society due to inequality, socio-economic status, gender bias and stereotypes in the justice system. I fully appreciate the work done by various entities in the justice system in promoting access to justice in their various spheres. The academy plays a pivotal role in access to justice as it is through its training that lives of those responsible for administering justice is initially shaped.

The Faculty of Law, through collaboration and with the support of European Union and UNDP *Amkeni Wakenya* co-created a conference on the theme ***Strengthening Access to Justice through Legal Aid***. This conference brought together stakeholders in the justice sector to a high-level dialogue on access to justice and legal aid through presentations of quality papers on the various thematic areas. By discussing the thematic areas, the articles in this journal bring to the fore challenges and opportunities in the field of access to justice and legal aid that generate useful information for reading and future interventions to improve access to justice for citizens.

Volume 1 focuses on the evolution of legal aid and the legal framework associated with it. It discusses legal education institutions as vehicles for promoting access to justice, the use of traditional justice systems as well as Paralegalism to expand the justice axis.

Prof. Isaac Kibwage HSC
Vice Chancellor, Egerton University

Foreword

On behalf of the United Nations Development Programme (UNDP), I am proud to be associated with the publication of the inaugural volume of the Egerton Law Journal. This is indeed a milestone, being the first publication focusing exclusively on the submissions from the 1st National Legal Aid Conference on Access to Justice in Kenya, held in December 2020 to share experiences on access to justice through legal aid.

The inaugural volume explores the journey in operationalising Article 48 of the Constitution of Kenya- a guarantee of *access to justice for all.* The contributions analyse the multi-layered and complex challenges of accessing justice for the sections of society that are poor, vulnerable, and marginalised such as women, children, persons with disabilities and other groups. These groups are disproportionately affected by inequality and other structural impediments that hamper their capabilities. Importantly, the issue highlights the value of the constitutional right to access to justice as a basic principle of rule of law and a component of attaining the Sustainable Development Goal (SDG) 16.

The Journal consists of 10 articles, including an introduction by the Egerton University Vice Chancellor, Professor Isaac Kibwage. I commend the Faculty of Law at Egerton University, contributors, and peer reviewers for pulling together a timely and thought-provoking volume that brings together authors displaying a wide breadth of expertise not only about the highly complex challenges and problems facing the access to justice in Kenya but also regarding the potential that exists in the legislative and policy framework to support inclusive development and just peace.

This collection of articles pursues specific objectives while complementing the existing literature on legal aid and law school-based schemes, alternative justice systems and traditional dispute resolutions mechanisms. In acknowledging the

importance of operationalisation of the Legal Aid Act, 2016 and the Alternative Justice System Baseline Policy (2020), the articles critically analyse the implications of formalisation, and to an extent, regulation of informal justice structures, including the paralegal schemes and traditional dispute resolutions mechanisms that exist within informal urban and rural contexts. Alternative Justice Systems (AJS) have extensively featured in this journal issue with authors articulating the importance of implementation of the AJS policy as a means of providing more flexible and friendly dispute resolution mechanisms.

In documenting the role of legal education providers and challenges faced by universities and law schools in ongoing university-based legal aid programmes, the review of school based pro-bono schemes is set to ignite discussions on the alternatives pursued in the issue including unique improvements in the clinical legal education, provision of adequate funding while also incentivising advocates through tax reliefs and integration of pro bono services within the Law Society of Kenya's Continuous Professional Development (CPD) system.

While I hope this journal will appeal to justice sector practitioners, I am confident that the volume will raise interest amongst development partners, civil society organisations, scholars and legal practitioners on the broader peace, justice, and development nexus.

Walid Badawi
UNDP Kenya Resident Representative

Acknowledgement

The editorial Board would like to thank all those who have made it possible for the successful production of the Faculty's inaugural journal on ***Strengthening Access to Justice through Legal Aid-Gaps, Challenges and Opportunities***. We sincerely thank all the authors who have contributed to this Volume. Special gratitude goes to our panel of peer reviewers for dedicating their time, energy and expertise in ensuring quality of the papers published. We recognize Mr. Walid Badawi, Dr. Dan Juma, Dr. Kituku Wambua, Gathoni Njenga and Brenda Achungo and the entire *Amkeni Wakenya* team for their commitment and valuable support as we worked towards making the launch of this inaugural journal a reality. We are greatly indebted to European Union and United Nations Development Programme *Amkeni Wakenya* Project for the technical and financial support for the entire process of producing the journal. We appreciate the entire staff of the Egerton University Faculty of Law and the FOLLAP team for their support to the project. Finally, we extend our gratitude to our advisors and the following Universities- Egerton University, The University of Nairobi, Moi University, Strathmore University and Africa Nazarene University for making it possible for the collaboration.

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Evolution of Legal Aid in Kenya

Flora Bidali*

ABSTRACT

Legal aid is defined as legal advice, legal representation, and assistance in resolving disputes by alternative dispute resolution, drafting relevant documents ad effecting service incidental to any legal proceedings, and reaching or giving effect to any out of court settlement as provided for in section 2 of the Legal Aid Act , 2016. The Black's Law Dictionary 9th Edition at page 912, further defines legal aid as the free or inexpensive services provided to those who cannot afford to pay full price. In a bid to adequately assess the evolution of legal aid in Kenya, this paper evaluates the position before and after the promulgation of Constitution of Kenya 2010. *Before the Constitution of Kenya 2010, access to justice in Kenya was bedevilled with countless challenges including prohibitive court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing by the providers of the service, lack of financial independence, lack of effective remedies, backlog of cases that delays justice, lack of awareness on ADR and traditional dispute resolution mechanisms. Prior to the promulgation of the 2010 contitution the government* provided indigent persons with legal aid*, however, in a limited matter as elucidated in the National Action Plan Legal Aid 2017-2020 Kenya. Legal aid was only available to accused persons who were charged with capital offences of murder facing trial in High Court. Despite the Civil Procedure Code having a provision for persons to sue as Paupers the procedure to determine eligibility was and remains nerve wracking. This paper traces the historical development of legislation and policy on legal aid in Kenya. Over the years we see how legal aid has evolved from being more of theoretical aspect to being a prevalent practical service that is offered across the country. The Constitution of Kenya 2010 and the Legal Aid Act 2016 strengthened the principle of access to justice as the instruments birthed the need of effective legal aid provision. Currently, the* the pivotal organ for legal aid and awareness established by the government *is the National Legal Aid Service and the monitoring and evaluation of all the stakeholders by the institution/organ allows for the furtherance of the main goal for access of justice.*

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Key Words: Alternative Dispute Resolution, Conflict, Legal aid, Mediators, Social Fabric.

INTRODUCTION

In all societies of the world, conflicts are inevitable and ubiquitous. This marvel will always be there throughout human history as long as there are differences in interests, goals, values and aims within the members of any given society. The sources, the individuals and the nature of the conflicts will always arise within the basic units of the community including the families, clans, villages and sometimes within the country. In every society, there are legal systems within the law that are usually applied to address the conflicts. However, legal systems within some countries are accessible by only a few members of the community due to many impeding factors.

In Kenya, the utilization of the legal aid mechanisms to resolve conflicts has been viewed as a strategy to address conflicts, however, its application is still not widespread. Legal aid is defined as legal advice, legal representation, and assistance in resolving disputes by alternative dispute resolution, drafting relevant documents and effecting service incidental to any legal proceedings, and reaching or giving effect to any out of court settlement[1]. The Black's Law Dictionary further defines legal aid as the free or inexpensive service provided to those who cannot afford to pay full price[2]. In a bid to assess the evolution of legal aid in Kenya robustly, the pre and post-2010 positions of legal aid are evaluated.

The Alternative Disputes Resolution mechanism which is within the legal systems is one of the vital institutions for conflict resolution in community and locality within Kenya. Even in countries with no formal state recognition of the institution of alternative dispute resolution, legal aid has remained resilient and continues to exist outside the spheres of state influence. This paper intends to highlight the role of legal aid in resolving conflicts in Kenya and how this has evolved with time. The paper starts by highlighting the evolution of legal aid in Kenya before 2010 and then situates the legal and justice system in the country post-2010. It highlights the bottlenecks, success factors and thereafter the opportunities for future success.

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1 Section 2, Legal Aid Act, 2016.

2 Bryan A Garner (Ed) Black's Law Dictionary 9th Edition Pg 912.

Methodology

The critical review of the strengthening of access to justice through legal aid in Kenya, assessing gaps, challenges and opportunities relied heavily on the secondary data. Information from various sources was gathered and reviewed to determine the issues that have been hindering the access to justice in the Kenyan Justice Systems. The various literature published and widely applied in the Kenyan legal systems and the various articles of the Kenya Constitution 2010 were reviewed as a mechanism to comprehend the evolution of legal aid in Kenya.

The Position of Legal Aid Pre- 2010

Previously, before colonialism, in Kenya like any other African communities, individuals and societies were living communally in families, clans and villages in a cohesive manner. Conflicts could arise due to many factors, but non-formal mechanisms were in place to solve them. Those without resources could be assisted to access justice within the community. Everyone wanted to be part of the community, as much as there were variations in life[3].

Conflict resolution amongst Kenyan communities has since ancient times taken the form of negotiation, mediation, reconciliation or 'arbitration' by elders. Communally, disputing parties would sit together informally and resolve disputes and conflicts to maintain social harmony and restore social bonds[4]. Thus, all the methods of dispute resolution had the aim of restoring social order. Conflict resolution was wholesome and tried to resolve all the underlying causes of conflict by ensuring that the parties to the conflict participated and reached a settlement. In some cases, fines and compensation were used but only as a means to acknowledge the wrongs done and restore the parties. The fines and the compensation were not retributive but compensatory. The social bonds and social ties referred to as social capital enabled elders to resolve disputes since the threat of exclusion from the communitymade parties willing to settle[5].

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3 Kariuki, F. (2015). Conflict resolution by elders in Africa: Successes, challenges and opportunities. *Challenges and Opportunities (July 9, 2015)*.

4 Li, Y., Li, Q., Gao, J., Su, L., Zhao, B., Fan, W., & Han, J. (2016). Conflicts to harmony: A framework for resolving conflicts in heterogeneous data by truth discovery. *IEEE Transactions on Knowledge and Data Engineering*, *28*(8), 1986-1999.

5 Bengtson, V. L., & Oyama, P. S. (2007). Intergenerational solidarity: Strengthening economic and social ties. *New York: United Nations Headquarters*.

Additionally, the concept of social harmony and peace was not only among the living but also between the living and the dead. For some wrongs such as murder, rituals and cleansing had to be carried out to allow the spirit of the dead to rest in peace and not disturb the living. Some dispute resolution mechanisms involved reference to ancestors and spirits due to the importance of lineage and ancestry among Africans. Reference to spirits, trials by ordeal, rituals and cleansing in dispute resolution were the preserve of traditional healers, diviners and seers, who complimented elders in the dispute resolution process[3]. These were mechanisms that strengthened the social fabric and are now advocated in Kenya through the Legal Aid Act.

The factors which could limit individuals from accessing justice in this set up were minimal and its informal nature made access easier for all. After colonialism, the legal system was streamlined. A formal legal systems few selected individuals were trained on the systems and the language to use[4]. The court systems started working and centralized places were selected to act as court chambers. Most of the informal conflict resolution mechanisms were quashed and individuals started to follow the laid down formal legal systems. Before the 2010 era, the application of legal aid was in limbo.

Within this period, access to justice in Kenya was bedevilled with countless challenges including prohibitive court fees, geographical location, the complexity of rules and procedure, use of legalese, understaffing by the providers of the service, lack of financial independence, lack of effective remedies, a backlog of cases that delay justice, lack of awareness on ADR and traditional dispute resolution mechanisms.[6] Before the promulgation of the 2010 Constitution, the government provided legal aid services to indigent persons, however in a limited matter[7]. Legal aid was only available to accused persons who were charged with capital offences of murder facing trial in the High Court[8]. Despite the Civil Procedure Code[9] having a provision for persons to sue as paupers, the procedure to determine eligibility was and remains cumbersome for the target group.

Legal Aid was further provided under the Children's Act (No. 8 of 2001). Section 186 of the Act provides that every child accused of an offence to be provided with legal representation at the expense of the state. This position is supported in

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6 http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf accessed 19 October 2020

7 National Action Plan Legal Aid 2017-2020 Kenya.

8 ibid.

9 Order 33, Civil Procedure Rules.

international law. Under international human rights law, the Convention on the Rights of the Child (Ratified 1990) under Article 37 guarantees every child deprived of his or her liberty prompt access to legal and other appropriate assistance and the right to challenge the legality of such deprivation before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. The African Charter on Human and People's Rights (Ratified 1992) under Article 8(c) obligates state parties to establish adequate educational and other appropriate structures with particular attention to women and to sensitize everyone on the rights of women.

The process of developing the legal framework on access to justice and legal aid began in 1998 when the Attorney General set up a Legal Aid Steering Committee comprising of government departments such as the Judiciary State Law Office, the Kenya National Commission on Human Rights and representatives of the civil society[10]. In 1999 the Committee identified possible models for legal aid delivery in Kenya. As a result of this, a framework for piloting legal aid and awareness was proposed in 2001 but the same was not rolled out. Although the said framework was not validated, in 2001 the Kenyan legislative framework on legal aid was enacted. All this was developed and supported through the understanding the diversity of Kenyans[11].

Colonization brought a cultural conflict between the Kenyan and western cultures. The western culture was viewed as superior and dominant, thus subjugating African cultures[12]. Cultural imperialism was extended to the world of dispute resolution. Kenyan cultures were allowed to guide courts so long as they are not repugnant to justice and morality, yet repugnancy was measured by western sense of justice and morals rather than Kenyan[13].

After the 2002 election, a new government came into power and directed the

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10 Ouma, Y., & Chege, E. (2016). Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide. *International Journal of Clinical Legal Education*, *23*(5), 107-134.

11 Nanjala, C. (2013). Determinants of effective legal Aid service delivery in Kenya. *International Journal of Social Sciences and Enterpreneurship*, *1*(5), 271-288.

12 Musau, P. M. (2003). Linguistic human rights in Africa: Challenges and prospects for indigenous languages in Kenya. *Language culture and curriculum*, *16*(2), 155-164.

13 Ndege, P. O. (2009). Colonialism and its Legacies in Kenya. *Lecture delivered during Fulbright–Hays Group project abroad program: July 5 to August 6*.

newly formed Ministry of Justice National Cohesion and Constitutional Affairs to give policy directions in the area of access to justice[14]. The ministry then set up a weekly legal aid clinic held every Wednesday to members of the public. These services were in high demand from the members of the public thus prompting the ministry to engage consultants in the year 2005 who developed the 2001 report and aligned it to Executive Order No. 2 of 2003. The report was revised and validated by stakeholders in 2006 and presented in 2007. All this was in anticipation of not only not only enhancing access to justice but also strengthening social capital but also ensuring that the social capital is strengthened and empowered[15].

In 2007 the Ministry of Justice National Cohesion and Constitutional Affairs established the National Legal Aid and Awareness Programme (NALEAP) vide Gazette Notice No. 11598 of 2007 aimed at advising the government on matters of access to justice and drawing lessons for the establishment of a national legal aid scheme[16]. NALEAP was also a build-up from previous efforts at creating a legal aid programme by the Office of the Attorney General and other stakeholders[17].

For instance, in the year 2018 and 2019 at Nakuru Pilot Office, National Legal Aid and Awareness Programme managed to resolve 277 maintenance cases, 89 custody cases and a total of 331 cases combined. NALEAP further piloted six thematic areas from the year 2009 to 2013 with various legal aid providers and other stakeholders in the justice system[18], thereby contributing to the implementation of the government's Medium Term Plan, 2008-2012 and Vision 2030 under Strategic Theme 6 that focuses on six thematic areas[19].The initiatives to develop a legal aid legislation and policy were undertaken through consultative processes between the government and civil society. This marks the position of legal aid in Kenya pre-2010.

14 Gibson, B. (2008). *The New Ministry of Justice: An Introduction*. Waterside Press.
15 Ouma, Yohana & Chege, Esther. (2016). Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide. International Journal of Clinical Legal Education. 23. 107. 10.19164/ijcle.v23i5.567.
16 National Action Plan Legal Aid 2017-2020 Kenya (50)
17 ibid.
18 ibid.
19 ibid.

Legal Aid Post 2010

The promulgation of the Constitution of Kenya 2010 shed light on the vital principle of access to justice. The different articles elaborate on the rights of various individuals seeking justice and roles of the justicie and legal aid providers. The Constitution of Kenya (Article 159(2)) guarantees the right of every individual to access justice[20] and this is promoted both formal and informal justice systems as a way to resolve disputes[21]. The recognition and protection of human rights and fundamental freedoms has to be effected to preserve the dignity of individuals and communities as well as to promote social justice[22]. The recognition of alternative dispute resolution methods (either formal or informal) was aimed at hastening the justice process. The constitution appreciated the roles of the informal systems of justice. All this was done to not only promote justice, but also strengthen the social fabric within the societies after a conflict has been resolved.

Dispute resolution by alternative methods other than the rigorous and lengthy court systems acted as a mechanism from which society derives some benefit. Those allowed to resolve conflicts, do so due to their long experience, wisdom and the respect they are accorded in society. The application of the alternative mechanisms was based on the various social theories that highlighted the need of a win-win situation in conflicts resolutions. For instance, the social solidarity theory, being a functionalist theory, explains the resilience of dispute resolution by members of the courts selected or individuals within the communities even in modern societies that have embraced western legal systems. Where a community cannot access formal justice systems due to costs and other externalities, elders are there to resolve arising disputes. Therefore, the existence of disputes resolvers is a social fact in the society providing a dispute resolution utility occasioned by the absence or low penetration of western legal systems[23].

Article 27(1) of the constitution of Kenya 2010, which is in line with the protection of the rule of law, enshrines equality before the law and the right to equal protection and equal benefit of the law. Moreover, accused individuals have the right to choose and be represented by an advocate as well as to be

20 Article 48, Constitution of Kenya, 2010.
21 Article 159(2), Constitution of Kenya, 2010.
22 Article 19(2), Constitution of Kenya, 2010.
23 Komter, A. E. (2005). *Social solidarity and the gift*. Cambridge University Press.

informed of this right[24]. This provision goes further to ensure that individuals who cannot afford legal representation[25] The Constitution of Kenya 2010 stand as the turning point for legal aid in Kenya as it brought to fruition the importance of access to justice and the dire need to provide legal aid in order to ensure that no individual is barred from attaining justice due to their financial status or inability to comprehend the law.

The vitality and essence of the legal system being all encompassing was set forth especially after 2010 as efforts to develop adequate legal aid services by both state and non-state actors began to unfold. This is mainly due to difficulties that were experienced in the formal system[26]. The challenges (financial, legal language etc) denied individuals an opportunity to access justice or resolve conflicts based on the communal understanding. In some instances, culture plays a significant role in resolution of conflicts and gives shared interests some strength as compared to legal systems.

The Government of Kenya engaged in the process of developing policies on Legal Aid and access to justice based on the mandate set by the Constitution 2010 (Article 48). Through this, in 2016, legislation was developed to form the Legal Aid Act[27] that sets out the parameters to facilitate the legislative mandate. This was to allow Parliament to legislate and pass bills that support the adoption and financial support to the legal aid in Kenya. The application of the alternative dispute resolution mechanisms explains how people view reality, live and resolve disputes. When a society uses Alternative Dispute Resolution mechanisms, sometimes, people use their cultures to resolve disputes. Consequently, dispute resolution and other real-life conditions are sub-optimal when done through a foreign culture (formal legal mechanisms). The optimization of the community linkages are the some of the main aspects that are considered in the Legal Aid Act of Kenya.

Justice systems such as courts are thus sub-optimal in the Kenya context due to varying cultural context. For instance, while Kenyan traditional societies were and to a large extent are grouped communally, western societies are individualistic. This results in a cultural-conflict if western ideals are applied in dispute resolution. Moreover, while dispute resolution in Kenyan societies

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24 Article 50(2)(g), Constitution of Kenya, 2010.
25 Article 50(2)(h), Constitution of Kenya, 2010.
26 Gachie, A. J. (2016). *An evaluation of the need for regulation of online dispute resolution (ODR) in Kenya* (Doctoral dissertation, University of Nairobi).
27 The Legal Aid Act, 2016.

aimed at repairing social ties and restoring harmony; court justice systems are mainly punitive with a winner-loser ideology[28].

The Legal Aid Act of 2016 changed the provision of legal aid services in Kenya. As stated above, at the Nakuru Pilot Office, National Legal Aid and Awareness Programme managed to resolve a total of 331 cases combined in 2019. All these cases could have been at various stages in courts, clogging the other existing ones. The Act is guided by fundamental values and principles which have accelerated the delivery of justice services to the citizens. Moreover, the Act provides that legal aid is not limited only to criminal cases, but also includes civil and constitutional cases[29]. This has seen the reduction of court cases, hastened the delivery of justice and strengthened the social fabric.

The Act regulates the provision of legal aid services in Kenya and establishes the National Legal Aid Service[30] ("NLAS") to provide legal aid services to the vulnerable and indingent persons who qualify for legal aid services. Such individuals are referred to as 'indigent persons' in the Act, and a person is an indigent person if he/she cannot afford to pay for legal services[31]. Further, such a person by virtue of Section 36 should be a citizen of Kenya (b) a child; (c) a refugee under the Refugees Act; (d) a victim of human trafficking; or (e) an internally displaced person; or (f) a stateless person. All this persons are also allowed to seek alternative dispute resolution.

Additionally, modernity has had its fair share of negative impacts on Kenyan justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and, in most cases, older people rely on the younger people. Consequently, in some instances dispute resolution by courts has been affected by bribery, corruption and favoritism.

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28 Ambani, J. O., & Ahaya, O. (2015). The Wretched African Traditionalists in Kenya: The Challenges and Prospect of Customary Law in the New Constitutional Era. *Strathmore LJ*, *1*, 41.

29 Section 35, Legal Aid Act, 2016.

30 Section 5, Legal Aid Act, 2016.

31 Section 2, Legal Aid Act, 2016.

Apart from corruption and bribery, modernity and westernization have broken down the close social ties and social capital between families and kinsmen. In contrast to pre-colonial days when the most important family system was the extended family, in modern times the main family system, especially in urban areas, is the nuclear family. Migration to urban areas and an increasingly individualistic society have broken down the communal or extended family system and thereby reducing the influence of arbitrators. In addition, the superiority of the westernized judicial and legal system has further reduced the influence arbitrators have in resolution of disputes.

The Legal Aid Act recognised and appreciated the roles played by Alternative Disputes Resolution. Conflict resolution by alternative methods is based on social/cultural values, norms, beliefs and processes that are understood and accepted by the community and recognized by law. For that reason, people are able to abide and comply with their decisions. Respect for elders, ancestors, parents, fellow people and the environment is cherished and firmly embedded in the mores, customs, taboos and traditions amongst Kenyans. The admonitions, commandments and prohibitions of ancestors and community alternative methods are highly esteemed as they reflect experiences which have made communal life possible up to the present day.

The progress of legal aid in the last years has been significant in adopting the necessary methods in order to further the concept of legal aid in the country. NLAS has set out to accomplish eight strategic objectives[32], in order to fulfill its ultimate goal, which is to facilitate for access to justice for all. These objectives are as follows;

1. To strengthen the framework of policies, laws, and administrative processes that will ensure sustainable and quality access to justice. This was left to the legislative arm of the government to develop, legislate and pass acknowledgement that support the provision of legal aid in Kenya. The director, Legal Services who heads the legal services function in the National Assembly is responsible to the National Assembly for this service. The Director was supposed to supervise, guide, counsel, train and develops all legal staff and co-ordinate administration and overall management of the legal services provided to the National Assembly. These services include the formulation and dissemination of legal drafting policy in the National Assembly, liaison with the Director, Litigation and Compliance and the Office of the

[32] National Action Plan, Legal Aid 2017 – 2022 Kenya, pg 24.

Attorney General on litigation matters involving the implementation of the Legal Aid Act in Kenya.

2. To provide quality, effective, and timely legal assistance, advice, and representation for the poor, marginalized, and vulnerable. This has been the major mandate implemented by the National Legal Aid Services. This was made possible through the acknowledgement of the roles played by alternative disputes resolution mechanisms. Access to justice is an essential ingredient of the rule of law. Citizens and especially the vulnerable and the indigent need to access the courts and legal processes with ease for the realization of enforcement of rights provided in the law. Access to justice is one of the constitutionally recognized human and fundamental rights. Legal aid programs are a central component of strategies to enhance access to justice.
3. To enhance access to justice through legal aid and awareness. Inaccessibility to justice is a major issue internationally. There is therefore an urgent need to find solutions to protect peoples' through enhanced access to justice. The importance of community-based solutions, such as mass pro bono contributions from individuals, law service providers and other organizations cannot be overemphasized. Another important contributor to improved access to justice is promotion of pro bono work by all lawyers and law organizations at their own initiative. Additionally, supporting the establishment of free legal aid and legal awareness programmes with a focus on vulnerable groups, working with governments to ensure the sustainability of these services, and to develop legal frameworks for free legal aid, establish national free legal aid institutions, and plan for specific budget allocation to free legal services and facilitating policy dialogues on the rule of law and access to justice between the government and civil society
4. To promote and institutionalize the paralegal approach in access to justice. Paralegals are dedicated to legal empowerment as they help people to understand, use and shape the law. They are trained in law and policy and in skills like mediation, organizing, and advocacy. These paralegals work with clients to seek concrete solutions to instances of injustice. They form a dynamic, creative frontline that can engage formal and traditional institutions alike. They promote access to justice in courts.
5. To promote the use of alternative and traditional dispute resolution mechanisms (ADRMs). ADRM provides relief to congested or overloaded courts, thus facilitating access to justice; prevent excess cost and undue delay; and, providing more effective dispute resolution. Alternative Dispute Resolution Mechanism provides scientifically

developed techniques to the Judiciary which helps in reducing the burden on the courts. ADR provides various modes of settlement including, arbitration, conciliation, mediation, negotiation among others in a more flexible manner. The process allows someone to select their own Arbitrator or Mediator and the court is not involved as compared to the conventional court processes. The expenses are reduced, it is speedy, the results or the outcome of the process can be kept confidential and all the parties are allowed and given full participation thus fostering cooperation.

6. To establish an implementation, monitoring, regulatory, and support framework. Strengthening legal frameworks and justice institutions has gained momentum among governments and judicial actors. With the increase in effort and interventions in the sector, there has been a need to create tools to assess justice systems, in order to identify the main elements affecting the workings of the justice machinery. Think tanks and international organizations working in the field have contributed to a substantial body of indicators assessing various aspects of justice systems.
7. To allot fiscal, human, and technical resources for legal aid and awareness services in Kenya. Strengthening access to legal services requires several steps, including educating people about their legal rights, building the capacity of both governmental and traditional legal structures, linking legal services to opportunities for economic empowerment, and supporting partnerships between community-based legal services and national advocacy campaigns against corruption, gender discrimination, and other systemic abuses.
8. To undertake research to ensure evidence-based initiatives. There is need to support more research on the impediments of access to justice in Kenya. For instance, research by the Kenya AIDS NGO Consortium in 2004 revealed that most Kenyans engage traditional structures such as councils of elders for mediating and arbitrating disputes, rather than seeking justice through the police and courts[33]. The National Legal Aid Action Plan is being used to implement through a multi-sectoral and integrated approach including collaboration between the national and county governments with external support from development partners, civil societies, and the private sector[34].

[33] UNAIDS and WHO. AIDS Epidemic Update. 2005.

[34] National Action Plan, Legal Aid 2017 – 2022 Kenya.

CONCLUSION

This paper concludes that there is need to backup and strengthen the legal and policy framework for the application of alternative dispute resolution by mediators. In this regard, we can learn from the challenges and advantages of the Black Administration Act in South Africa. Emphasis should be placed on alternative dispute resolution as the first option in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt to alternative dispute resolution before approaching the formal legal system.

Within the legal systems in Kenya, the arbitrators or mediators engaged in the process lacks adequate and regular remuneration to prevent chances and opportunity for corruption. The legal systems and the legislative arm of the govenrmnmet has not developed a framework for appealing the decision of arbitrators to be strengthened in the alternative dispute resolution mechanisms. The development and strengthening of the enforcement mechanism for alternative dispute resolution mechanisms by arbitrators still wanting. Kenyan traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation.

Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations. Need for codification of key concepts, practices and norms of alternative dispute resolution to protect them. Further, such codification increases uniformity and consistency of application of alternative dispute resolution mechanisms by elders.

Enhancing Access to Justice through Law School Legal Aid Clinics: The Dual Role

Ruth Aura*

ABSTRACT

The need for justice in Kenya is ever growing with a large number of Kenyans being in a situation that requires a responsive justice system. However, indigent people are unable to have their legal needs addressed due to high costs of legal services. Most people are unaware of their rights and processes of seeking legal redress when violations occur. Although the Constitution safeguards the right to access to justice, the reality is that the disadvantaged people cannot access justice, afford legal representation, are unaware of their rights and redress mechanisms. Everyone is entitled to equal access to justice. Legal aid is important bridging the gap between the haves and have nots in accessing justice. The Legal Aid Act No. 6 of 2016 recognizes University legal aid clinics as legal service providers through provision of legal advice, representation, drafting of documents and legal literacy and enforcement. This paper looks into the challenges the indigents face in accessing justice and how University legal aid clinics can be used to mitigate the problem. This paper looks at Egerton University Faculty of Law Legal Aid Project (FOLLAP) as a case study in analysing the dual role legal aid plays in legal education. The primary argument made is that effective clinical legal education is attainable through efficient programmes for students under guidance of qualified practitioners. In doing this, the paper examines functional roles of legal aid clinics in other jurisdictions with legal aid for purposes of borrowing lessons intended to strengthen legal aid provision in Kenyan institutions of higher learning.

Key Words: access to justice, indigent, university legal aid clinics, legal aid, pro bono lawyers, foreign legal services delivery, Kenya, foreign jurisdictions, and best practices

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INTRODUCTION

Access to justice is a cardinal principle of the rule of law. It denotes a fair trial and the right to effective remedy.[1] This definition envisages an ideal situation where citizens know their rights, can access justice institutions and that justice systems are fair and administers justice without discrimination. It also paints a picture that the costs are affordable to all and therefore access is equal to all. This is the converse in reality, as in most cases, the majority of the world population are poor and cannot afford the costs associated with the justice system with far reaching outcome[2]. Several factors limit full access to justice including poverty, limited access to lawyers and lack of knowledge of legal proceedings among others[3]. Access to justice for the indigent is an issue that must be interrogated if the principle of equality for all before the law is to be upheld. The international community has addressed issues of access to justice as a fundamental human right through a raft of legal and policy frameworks, including, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of all forms of Discrimination Against Women, Maputo Protocol on the Rights of Women of Africa and the 2030 Agenda. These instruments and standards recognize access to justice as both a basic human right and a means to protect other universally recognized human rights. In particular Article 11, of the UDHR, the core Instrument on human rights that others stem from, recognizes legal aid as a foundation for the enjoyment of other rights including the right to fair trial that safeguards fundamental fairness and public trust in

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1 United Nations and the Rule of Law, *Thematic Areas- Access to Justice*. Available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>accessed on 1 March 2021.

2 United Nations Department of Economic and Social Affairs Division for Social Policy and Development The International Forum for Social Development (2006) Social Justice in an Open World the Role of the United Nations notes that the majority of the world population are poor and cannot afford the costs associated with the justice system pg 1 available online at https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf; See also World Bank (2021) Understanding Poverty available at https://www.worldbank.org/en/topic/poverty/overview accessed on 15 April 2021; See also World Bank Poverty and Shared Prosperity 2018 available at https://www.worldbank.org/en/publication/poverty-and-shared-prosperity-2018 accessed on 15 April 2021. Despite the tremendous progress in reducing extreme poverty, rates remain stubbornly high in low-income countries and those affected by conflict and political upheaval.

3 Office of the Attorney General and Department of Justice (2017) *National Action Plan on Legal Aid 2017-2022* Kenya Towards Access to Justice for All, pg. 5.

the criminal justice system[4]. The other instruments also impose obligations on governments and the legal profession to ensure that everyone has access to counsel regardless of their means or background to protect the right to equality before the law[5].

One of the strategies governments have devised to ensure access to justice for the indigent and marginalized population is the integration of legal aid provisions in their national constitutions and statutory law. To fulfil her international and national obligations, the Constitution of Kenya, has a progressive bill of rights that integrates access to justices as a cardinal principle of the rule of law. Article 48 for instance, guarantees every individual the right to access justice. The specific manifestation of this right is evident in several provisions, including, Article 49 (1) (c) which proffers to accused persons the right to communicate with an advocate[6] Article 50 (2) (h) is significant in that it gives an accused person in a criminal trial, the right to have an advocate assigned to him or her at the state expense.[7] Several legislation such as the Legal Aid Act[8], the Children's Act[9], Persons with Disabilities Act[10], Criminal Procedure Code,[11] and Persons Deprived of Liberty Act[12] also recognize legal aid as a way for marginalized and vulnerable members of the community to seek justice.

The enactment of the Legal Aid Act in 2016 expanded the scope and nature of legal services provided to include legal advice, representation, alternative Dispute Resolution, legal drafting, provision of legal information and law-related education, recommending law reform and undertaking advocacy work on behalf of the community[13]. Further, legal aid has been made available to groups of people beyond accused persons, resulting in vulnerable groups, including, women, children, persons with disabilities and indigent having better access to justice.

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4 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 11 (1).

5 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013 (A/67/458)) adopted by the General Assembly (AG) adopted during its 60th Plenary Meeting 20 December 2012.

6 Constitution of Kenya 2010.

7 Constitution of Kenya 2010.

8 Legal Aid Act No. 6 of 2016.

9 Children Act, Chapter 141, Laws of Kenya.

10 Persons with Disabilities Act, No. 14 of 2003.

11 Criminal Procedure Code, Chapter 75, Laws of Kenya.

12 Persons Deprived of Liberty, No. 23 of 2014.

13 Legal Aid Act No. 6 of 2016, sec 2.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa includes a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academic institutions"[14]. Further, Paragraph 4 (f) of The UN guidelines and principles recognize the contributions of paralegals, law students and civil society organizations as key actors in legal aid provision services.[15] At the national level, The Legal Aid Act recognizes University ran legal clinics as legal service providers giving law students the opportunity to enhance their practical legal knowledge while providing legal assistance to indigent persons. It is this recognition of law students as actors in legal provision that provides an entry point for law schools or institutions providing legal education to fill the gap in enhancing accessing to justice for the marginalized, the domain of this paper.

This seeks to interrogate the role of law schools, through legal aid programmes, in meeting the justice needs of the community. Egerton University Faculty of Law Legal Aid Project (FOLLAP) is used as a point of reference to demonstrate how law students can be or have been used to provide legal aid in the community, through a critical assessment of its strengths and challenges. Reference is also made to other jurisdictions for purposes of gauging what best practices exist and what can be learnt and borrowed from them. Such lessons are useful in making legal aid services within institutions of higher learning beneficial to the students and the community they serve. They can also generate policy recommendations for reform.

Research Methodology

This was desktop research on the role of university legal aid clinics in enhancing access to justice. It relied on both primary and secondary data. Primary data was obtained from treaties, conventions, protocols, domestic statutes and statutes from other jurisdictions. Reference was made to secondary data available in books, policies, government reports, journal articles, internet and newspapers, commission reports, policy documents among others, to highlight interventions, gains and challenges and

[14] Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, November 2004, s 1.

[15] UN Principles and Guidelines on Access to Justice to Legal Aid Guideline No. 4 Para 4(f).

recommendations and the way forward. Additionally, it relied on experiential data from the FOLLAP. FOLLAP has been in operation for a year now and therefore uses data obtained while providing legal aid services as a source of information for this paper.

Theoretical Perspective and Conceptual Linkages

Legal education institutions provide opportunities for students to learn and act as stepping stones to legal practice and judicial engagement. This often happens after students pass the bar exams and are admitted to the Roll of Advocates, a journey that is not accomplished overnight. It requires rigorous training which includes hands on exposure that legal aid clinics promise. According to Stromsem, legal education in most countries is insufficient due to expanding needs of citizens, resulting into slow adoption of education models that stress practical methods of instructions as a complement to theoretical alternatives[16]. Manteaw attributes the problem to the historical development of legal education in Africa and its emphasis on the inherited colonial system. The system not only "facilitated the profession's loss of touch with local realities and with the needs and aspirations of the poor majority" but also revealed "grave inadequacies in the ... legal training that prepared these lawyers for practice in Africa[17]. This inevitably explains structured resistance to *pro bono* lawyering and indeterminate reception of such services. Introducing legal aid or clinical studies in the university law schools has therefore become imperative and finds anchor in human rights principles. It exposes students to the world's legal problems that may inculcate the duty to give back to the community upon completion of the advocates training program.

In proposing the integration of legal aid in law schools, this paper adopts human rights-based approach in its analysis of legal aid services. Legal aid is a concept anchored in international human rights standards which are geared towards promoting and protecting human rights by identifying rights holders and their entitlements as well the corresponding duty bearers and their obligations. This brings to the fore the state's duty to provide legal aid to the marginalized through the established systems and recognized institutions, such law schools under the Legal Aid Act. This approach is likely to ensure

16 Jan Stromsem, *Africa Regional Rule of Law Status Review* (Washington, DC: USAID 2009) 58. Retrieved from: http://pdf.usaid.gov/pdf_docs/PNADO804.pdf . accessed on 9 March 2021.

17 Samuel Manteaw, "*Legal Education in Africa: What Type of Lawyer Does Africa Need*?", 39 McGeorge, L. R. (2016) p. 916 available online at https://scholarlycommons.pacific.edu/mlr/vol39/iss4/ .

mechanisms for ensuring access to justice and essential information, effective participation including representation.

Linking legal aid to human rights offers possibilities of providing legal services to the needy to fulfil their basic rights and to access justice without hindrance. According to the Inter Parliamentary Union,[18] human rights are inherent in all human beings and define relationships between individuals and power structures, especially the State. Additionally, human rights delimit State power and require States to take positive measures ensuring an environment that enables all people to enjoy their human rights[19]. Over the years legal aid has been increasingly considered as a basic human right through national, regional and international legal frameworks. It is considered as an important element of access to justice necessary for attainment of equality, development and peace[20].

This paper also adopts theory of change in clinical legal education in its analysis of the dual role of legal aid. The goal of clinical legal education is to teach creative lawyering, social justice and fairness among others.[21] It is therefore imperative that clinical legal education be enhanced to enable law students to be client-centred, to improve interviewing skills and to grapple with their roles as lawyers in relation to their clients, the legal system and the greater community[22]. Theory of change articulates explicitly how a project is intended to achieve outcomes through actions[23].

Universities must have objectives for establishing legal clinics, which is, to enhance access to justice for the marginalized while providing experiential learning to its students. This creates a link between legal aid and the theory

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18 Inter Parliamentary Union & OCHR 2016 Human Rights Handbook for Parliamentarians HR/PUB/16/4 (UN)19.

19 ibid.

20 Magdalena Sepulveda, *From Underserving Poor to Right Holders: A human Rights Perspective on Social Protection Systems* 2014, UNRISD, ILO, ECLAC, OCHR UN WOMEM, UNICEF UNAIDS UNECA; See also Kate Donald & Magdalena Sepulveda 2014 Access to justice for persons living in poverty: a human rights approach UNRISD, ILO, ECLAC, OCHR UN WOMEM, UNICEF UNAIDS UNECA.

21 Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education* (13 Am. U. J. Gender Soc. Poly and L. 161 2005).

22 ibid.

23 Laing K and Todd L, *Theory-Based Methodology: Using Theories of Change in Educational Development, Research and Evaluation* (Research Centre for Learning and Teaching, Newcastle University 2015).

of change, in that, a university must identify the goals and objectives of the legal clinics and, identify the activities that will enable them achieve the said goals and objectives. Theory of change is important in the development and running of legal aid clinics as a guiding tool for achievement of goals and objectives.

The question is how access to justice can be enhanced to the marginalized and poor and to what law schools can do within their spaces to make justice a reality to the vulnerable. It also questions the legal frameworks available promoting use of academic institutions in this endeavour and the role that it serves to both the students and the community. In the quest to answer some of the questions, the paper analyses obligations, inequalities and vulnerabilities that impact on human rights and which necessitate interventions through legal aid. It also sheds light on the constitutive element what legal aid from a legal education perspective for a better understanding of the services needed and advocacy for policy recommendations and law reform.

Historical Development of Legal Aid

Legal Aid was introduced in Kenya in 1973 through the establishment of Kituo Cha Mashauri, later named Kituo Cha Sheria, where students from University of Nairobi, Faculty of Law and the Law Society of Kenya would offer free legal advice and education to poor Kenyans[24]. With time, other organizations started to offer free legal aid services such as FIDA-Kenya which was established in 1985, offering services to many women and their children[25]. In May 1998, the Attorney General's Office with other stakeholders established a Legal Aid Steering Committee tasked with developing a legal aid scheme. The Committee came up with the Legal Education and Aid Pilot Programme in 2001[26]. This is the basis of the Legal Education and Aid Programme within Kituo Cha Sheria whose functions include provision of legal services to walk

[24] Kituo Cha Sheria-Legal Advice Centre, Our History. Available at http://kituochasheria.or.ke/about-us/#1455270259386-be23d72a-a9f2, accessed on 29 September 2020.

[25] FIDA KENYA, *About FIDA-Kenya*, available at https://fidakenya.org/site/history, accessed on 29 September 2020.

[26] Caroline Amondi, Legal Aid in Kenya: Building a Fort for Wanjiku in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and The New Constitutional Order in Kenya*, 2014.

in clients and through mobile clinics, and training community groups and paralegal officers in order to enhance their capacity in legal aid work[27].

The National Legal Aid and Awareness Programme (NALEAP) was established in 2007 by the then Ministry of Justice National Cohesion and Constitutional Affairs. The role of NALEAP was to advice government on matters of access to justice for the establishment of a national legal aid scheme[28]. National Legal Aid and Awareness Steering Committee was also established to oversee and coordinate the programme for legal aid provision in Kenya[29]. The 2010 Taskforce on Judicial Reforms noted that legal aid was only available to persons charged with murder[30]. The Taskforce recommended a policy and legislative framework for the establishment, adoption and implementation of a national legal aid system., and for judicial officers to ensure the vulnerable are accorded a fair hearing[31].

Kenya Vision 2030 is a development programme whose goals include enacting and implementing a legal and institutional framework that is key in promoting fair, affordable and equitable access to justice.[32] The 2nd Medium Term Plan of Vision 2030 seeks to implement legal aid and education in Kenya through operationalization of a country-wide legal aid scheme, legislation of the Legal Aid Bill and development of legal aid guidelines[33]. Further, it recognizes the need to develop a regulatory framework for legal aid and to enhance the capacity of non-state actors[34].

The enactment of the Legal Aid Act in 2016 provided an opportunity for the poor and vulnerable to access Justice. It expanded the type of persons who can access free legal aid and the services provided[35]. The Act acknowledges other legal service providers such as university legal clinics as major contributors to access to justice for the indigent[36]. Even though universities

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27 Kituo Cha Sheria, Legal Aid and Education (LEAP) Programme available at: http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/, accessed on 29 September 2020.

28 National Action Plan, Legal Aid 2017-2022, Kenya.

29 ibid.

30 Government of Kenya, *Final Report of the Taskforce on Judicial Reforms* OUKO Report (July 2010).

31 ibid.

32 Republic of Kenya, Vision 2030 (Popular Version), 2007.

33 Republic of Kenya, Vision 2030, Second Medium-Term Plan, 2013-2017.

34 ibid.

35 Legal Aid Act, No. 6 of 2016, sec 2.

36 ibid.

like Moi University legal aid programme under Ampath provided legal aid in specific cases, there was no proper legislation that properly acknowledged the role of universities in providing legal aid services.

As a process of operationalizing the Legal Aid Act, the National Action Plan Legal Aid 2017-2022 (NAP) was launched with broad objectives to strengthen frameworks for policies, laws and administrative processes to ensure quality access to justice[37]. Other objectives were to provide quality legal services to the marginalized and to enhance access to justice through legal aid[38]. It important to note that the NAP is a very progressive document with a full-fledged implementation matrix stipulating roles and responsibilities of every actor in the provision of legal aid services in Kenya. The historical background of legal aid in Kenya demonstrates Kenya's commitment to ensure all its citizens' rights to access to. Through collective contribution of the State and non-state actors, access to justice for all can be realized.

Legal Aid, Legal Clinics and the Law

Kenya has signed, acceded to and ratified, without reservation, various international instruments, covenants, conventions and declarations that protect and promote human rights and access to justice. Being a state party to such international instruments, the country therefore is under an obligation to adhere to their provisions particularly in provision of legal aid services. International frameworks provide minimum rights standards that governments must uphold. Public universities being part of government are bound by the standard under the principle of due diligence to ensure justice for all. *Article 13 (3)(d)* of the ICCPR which mandates states to provide legal assistance for persons charged with criminal offences, including legal aid, for those who cannot afford to pay. *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012* guide member states on the principles on which a legal aid system in criminal justice should be based on. Principle 1 obligates states to guarantee the right to legal aid in their national legal system and in their constitutions. Principle 14 recognizes the contribution of university legal clinics and requires member states to recognize and encourage university law schools and other non-state legal aid providers in providing legal aid. This is an important provision in so far as anchoring legal aid in curricula in the universities and use that opportunity to provide legal aid using the students. It is imperative given consistency of student population at admission and consistency in legal aid provision.

[37] National Action Plan, 2017-2022.
[38] ibid.

The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), particularly rule 61 (3) requires prisoners to have access to effective legal aid. *The Basic Principles on the Role of Lawyers (1990),* the third principle obligates member states to provide sufficient funding and other resources for legal services to the poor and other disadvantaged persons with the cooperation of professional associations of lawyers who are required to organize and provide legal services, facilities and other resources. It therefore imposes a duty on governments to establish funding schemes that legal aid actors can draw from to roll out legal aid activities in their institutions.

Other instruments include: Article 8 of the *UDHR* which guarantees everyone a right to an effective remedy by competent national tribunals for acts violating the fundamental rights. Similarly, Article 2 (c) of *CEDAW* mandates states to establish legal protection of the rights of women on an equal basis with men. Article 37 (d) of the *Convention on the Rights of the Child* obligates States to protect children deprived of their liberty, including right to access legal aid and appropriate assistance.

Regionally, there are instruments that also advocate for access to justice for all including legal aid. For instance, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)* recognises the right of an individual to legal assistance at no cost where the interests of justice so require. Article 8 of the *Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa (2003)* requires member states to ensure effective access to judicial and legal services, including legal aid by women. Additionally, they are required to support local, national, regional and continental initiatives directed at providing women access to legal services including legal aid through various institutions such as schools of law.

Paragraph 1 of the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004)* encourages states to adopt measures and allocate sufficient funds for the delivery of an effective legal aid system that ensures indigent persons especially women and children access justice. The Declaration at paragraph 3 stipulates that a legal aid program should provide legal assistance at all stages of the criminal process. Paragraph 9 mandates governments, the private sector, and development partners to appropriate funds, provide professional services and establish infrastructure to satisfy community needs in the long-term. Such requirements can work if the university legal clinics are sufficiently funded to roll out legal aid activities.

The Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of 2004, recognizes that legal aid reduces excessive and arbitrary pre-trial detention, improves the administration of justice, increases public trust in justice and can boost socio-economic development at the family and community level. Its recommendation calls upon legal aid providers to continue providing meaningful legal aid to indigent persons and for systems to utilize legal service providers and develop partnerships with each other in order to facilitate access to legal aid for indigents. Article 17 (2)(c)(iii) of the *African* Charter on the Rights and Welfare of the Child *(1999*) obligates member states to provide legal assistance to children criminal offenders and other assistance in preparation of their case where they cannot afford services or lawyers.

At the national level, there are also legal frameworks addressing legal aid and access to justice. For instance, Article 50 (2) (g) of the Constitution provides that an accused person has a right to choose and be represented by an advocate and to be informed of this right. Article 50 (2) (h) obligates the state, at its expense, to have an advocate assigned to the accused person if substantial injustice would otherwise result, and to be informed of this right promptly.

Section 2 of the Legal Aid Act, gives statutory recognition to Universities legal aid clinics and other institutions operating legal aid clinics as legal aid providers. Section 7 (i) requires the National Legal Aid Service to promote, and supervise the establishment and working of legal aid services in universities, colleges and other institutions. Section 36 (1) has made Legal aid accessible to, other than accused persons, to children, and refugees under the Refugees Act No. 13 of 2006, victims of human trafficking, internally displaced persons and stateless persons.

Other legislations include Section 77 of the Children's Act which provides that Courts, where the child is unrepresented, may give orders for the child to be granted legal representation at the expense of Parliament. Section 38 of the Persons with Disabilities Act provides that the Attorney General in Consultation with the National Council for Persons Living with Disabilities and the Law Society of Kenya should make regulations for free legal services for persons with disabilities. Sections 137F and 193 of the Criminal Procedure Code provides for the right of the defenders to legal representation of their own choice or where necessary, to court appointed legal representation. The Persons Deprived of Liberty Act, No. 23 of 2014 emphasizes the rights of

arrested persons to be notified of legal aid where it is available and its use as provided in the Constitution of Kenya, 2010[39]. The Act also protects the rights of aliens to legal aid where consular assistance is not available[40].

In summary the legal framework imposes an obligation on the government to ensure access to justice to her citizens and to eliminate unjust distribution of power that impede access to justice. Since government is not in a position to fully guarantee provision of legal aid services, the instruments takes cognizance of the gap and encourages a multi-sectoral approach to this particular service delivery by imploring civil societies, religious institutions and learning institutions to partner with government. This is how Egerton University as a learning institution of legal education took up the challenge.

Legal Aid

The Report of the Commission on Legal Empowerment of the Poor[41] reveals that the poor, vulnerable and marginalized people are far from the protection of the law and are susceptible to abuse, discrimination and corruption in their day to day lives as well as in their pursuit for justice[42]. The Report recognizes that legal empowerment is key in the reform process of the justice sector to protect the rights of the disadvantaged. It defines legal empowerment as a process of systematic change through which the indigent become able to use the law, the legal system and legal services to protect and advance their rights and interests as citizens[43]. The report finds broadening the scope of legal services to the poor necessary for justice to be more accessible. This can be done through designing efficient legal aid system which emphasizes on legal assistance provided by paralegals and law students[44].

The Legal Aid Act provides an entry point for University Legal Aid Clinics to provide legal assistance to the indigent citizens[45]. Law students have the

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39 Section 6, Persons Deprived of Liberty Act, No. 23 of 2014.
40 Section 11, Persons Deprived of Liberty Act, 2014.
41 Commission on Legal Empowerment of the Poor*, Making the Law Work for Everyone, Report of the Commission on Legal Empowerment of the Poor*, Volume I, 2008. Available at https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf accessed on 10 March 2021.
42 ibid.
43 Report of the Commission on Legal Empowerment of the Poor, Volume I, 2008, 3.
44 ibid. at pg. 62.
45 Legal Aid Act No. 6 of 2016, sec 2.

legal knowledge acquired in class to provide legal services, including legal advice, education and awareness, at the basic level. Therefore, students should take up the responsibility of reforming the justice sector and empowering the indigent persons in the community. Legal Aid plays an important role in the education and development of law students. Clinical Legal Education provides a learning environment where students interact with real clients under supervision of the faculty staff at the law school[46]. Legal Aid enables students to gain first-hand experience on legal practice as they interact with the clients, gain advocacy skills, and deepen their legal knowledge thus preparing them for actual practice.

To this end, legal aid plays a dual role for both students and the community who would otherwise find justice inaccessible due to their economic inequalities, exacerbated poverty. This is two-fold that is, students gain practical legal skills while providing free legal services to the marginalized while the community benefits from the services offered:

Benefit to Persons Seeking Legal Services

Many Kenyans lack sufficient resources to institute a suit or to access legal representation, lack of information about their rights, the different laws and the procedure of instituting a suit or defend themselves[47]. Legal aid counters some of the barriers faced in accessing justice. Legal aid enables individuals to be aware of their rights, to be aware of the legal process and remedies available to them where there is infringement of their rights. It also enables the poor and marginalized to access justice without financial requirements, and enables all individuals to be equal before the law and to have a fair hearing.

Legal Awareness and Literacy

Chapter IV of the Kenyan Constitution lays down the Bill of Rights that every Kenyan is entitled to, including the right to access justice and fair administrative action[48]. The poor and marginalized are at risk of breach and violation of their human rights due to lack of awareness of existence of such rights and availability of remedies for redress. For instance, the right to acquire and own property and not to be deprived of it arbitrarily is protected under Article 40 of the Constitution. However, many women are unaware of

[46] Lewis Richard, *Clinical Legal Education Revisited*, Available at https://core.ac.uk/download/pdf/8816908.pdf accessed on 10 March 2021.
[47] National Action Plan on Legal Aid 2017-2022 pg. 6 takes cognizance of this fact.
[48] Constitution of Kenya 2010, Art. 47 and 48.

this right and when widowed do not know how to institute succession causes. This inevitably results in the loss of property to unscrupulous third parties[49]. Additionally, the large number of laws applicable, and which are drenched in legalese, may be difficult to understand hampering for laypeople, therefore access to justice[50].

The scope of legal aid extends to provision of legal information and law-related education[51]. The recognition, by the Act, of the importance of legal awareness by every individual is a positive step towards reforming the justice sector. Legal aid enables indigent persons to better understand their rights and to use the law to advance their rights and interests. A study conducted on the impact of legal empowerment programmes on health and human rights revealed that persons who had received training on legal and human rights issues had greater awareness of how and where to access legal services to safeguard their rights[52].

A Report of the Commission on Legal Empowerment of the Poor demonstrates that, legal empowerment is only realized when the poor are able to use the law, the legal system and services to protect and advance their rights. Therefore, legal aid can spearhead legal empowerment by raising awareness and educating the marginalized on their rights and how to enforce them.

Legal Aid and Pro Bono Lawyering

Access to justice envisages a situation where an individual can lodge a complaint, have access to legal representation and their legal needs addressed within reasonable time. The nature of the Kenyan justice system which is adversarial requires one to either have legal knowledge or legal representation[53]. Article 50 (2) of the Constitution provides several rights of an accused person including the right to have adequate time and facilities to prepare a defence, to be informed in advance of evidence the prosecution intends to rely on and to have reasonable access to it and to adduce and challenge evidence. An arrested person requires sufficient knowledge of

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49 FIDA Kenya, *Women's Land and Property Rights in Kenya, A Training Handbook*.

50 Emma Senge Wabuke, Arnold Nciko and Abdullahi Abdirahman, *Promoting Access to Justice in Kenya: Making the Case for Law Clinics*, October 2018.

51 Legal Aid Act 2016, sec 2.

52 Gruskin S *et al, Access to Justice: Evaluating law, health and human rights programmes in Kenya*, Journal of the International Aids Society, 2013.

53 National Action Plan: Legal Aid 2017-2022 Kenya.

these rights as well as the correct laws and procedures applicable in his or her case in order to effectively defend themselves.

Thus, it is necessary for a person seeking justice to have legal representation in order to have a just legal process. However, the poor and marginalized are unable to access legal representation due to lack of financial capability to not only seek legal counsel, but also cater for other unavoidable expenses such as court fees, filing fees, service, transportation to court for attendances and disbursements among others. The financial inequality discourages and prevents the poor from accessing justice.

Adequate funding is necessary to ensure legal aid covers the full range of services to be provided to those seeking legal assistance. States are obligated to establish a legal aid fund to support legal aid schemes and legal aid providers at public and private levels, including university legal clinics[54]. To this end, the Legal Aid Act has established the Legal Aid Fund to be used *et al* to pay the expenses incurred in the representation of persons granted legal aid and to meet the expenses incurred by legal aid providers in providing legal aid services although the same is yet to be operationalized[55]. It is therefore imperative that the legal aid fund be operationalized in order to fund legal aid clinics and other legal aid providers so as to broaden their reach on poor and marginalized persons in Kenya.

Benefits for Law Students

The Kenyan legal education curricula focuses mostly on theoretical pedagogy while vocational and continuing professional education is handled by the Kenya School of Law[56]. With primary emphasis placed on theoretical legal knowledge for the better part of their learning process, law students become ill-equipped for actual legal practice once they are admitted to the bar. The skills and knowledge law students acquire in school heavily influences their career and practice. It is therefore imperative that practical knowledge be

54 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, Guideline 12.

55 Legal Aid Act 2016, sec 30.

56 Patricia Kameri-Mbote, Legal Education and Lawyers (2014), in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and the New Constitutional Order*, Strathmore University Press, pg. 132.

imparted from the beginning of their education.[57] Legal clinics provide an avenue for students to gain practical experience and translate theoretical knowledge into actual practice. A report by Kenya Institute of Policy Research and Analysis (KIPPRA) in 2019 indicated that the foundational training at undergraduate level which focuses strictly on academic principles may not be adequately preparing lawyers who are undertaking the training programme.[58] The report recommended universities to introduce courses in their curricula for practical training. Clinical Legal Education would provide a hands-on learning by experience to would be lawyers. This is how legal aid and clinical education becomes important in playing the dual role. It is worth noting that a number of law faculties now offer varied legal education that embellishes traditional legal education with clinical education in various versions and degrees[59].

Legal aid clinics gauge communication and interviewing skills of students. The students are required to interact with clients, to identify the pertinent legal issues based on the interview, do proper analysis and give sound legal advice to the clients in a language they understand. The experience enables students to sharpen their interviewing skills, which entails, effective communication techniques, how to effectively interact with clients from different social, economic and ethnic backgrounds, strengthened emotional awareness of their clients' situations, counselling skills, proper identification of legal issues from the information provided by the clients and translating the same into admissible evidence and finally, legal professionalism[60]. With proper supervision and guidance from legal practitioners who are part of the clinic, students can develop their interviewing skills, a skill paramount in the legal practice.

Legal research and writing skills are necessary for the practise of law. A legal practitioner should be able to identify the pertinent legal issues from the facts

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57 Silecchia L.A, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?,* 100 DICK. L. REV. 245 (1996). Available at https://core.ac.uk/download/pdf/232606629.pdf, accessed on 10th March 2021.

58 Report (2019). Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions. Para168 pg. 62.

59 Ouma, Yohana & Chege, Esther, *Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide.* International Journal of Clinical Legal Education (2016).

60 MA (Riëtte) Du Plessis, *Clinical Legal Education: Interviewing skills*, De Jure Law Journal Vol 51, n.1 pp. 140-162, 2018. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602018000100010&lng=en&nrm=iso#back_fn4 accessed on 15 March 2021.

provided by a client, conduct research on the applicable laws and apply the laws to the issues in order to give a credible legal opinion or give sound advice to the client. The same applies in legal clinics where students are required to provide legal assistance to clients concerning real issues affecting their lives. Therefore, Legal Aid enables students to gain and sharpen their legal writing and research skills and preparing them for the legal practice adequately.

Advocates in Kenya are guided by the principle of professionalism in their dealings with clients, fellow practitioners, third parties and the judiciary, and to be competent and diligent in provision of legal services.[61] Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct requires advocates to be competent by possessing the necessary skills and knowledge to handle a matter before them or to refer the client to a specialist if the matter is too complex, and to diligently protect the interests of the client in a timely manner including meeting court deadlines in filing legal documents and keeping them up to date. The same applies in provision of legal aid services, especially for those clients who require legal representation and assistance in drafting and filing necessary legal documents. Law students through the clinics therefore learn the importance of providing legal assistance to their clients competently and in a timely manner, and to be professional in how they deal with fellow practitioners, the judiciary and other parties.

Legal aid is meant to reach different individuals with different types of legal issues. This is evident from Section 35 (2) of the Legal Aid Act which does not limit the type of matters or areas of law that a service provider can handle. Therefore, Legal aid exposes law students to different legal fields which consequently enables them from an early stage to not only hone their skills, but also make informed decisions concerning the career they may want to pursue in future. Lastly, legal aid gives students an understanding of the difficulties indigent persons face as they seek legal assistance, thus giving them a sense of responsibility when they begin their practice to provide legal assistance to marginalized persons in the society and to participate in legal aid programmes for the benefit of such persons[62].

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61 Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, June 2016, Pt 11, Principle 8.

62 Quintin Johnstone, Law School Legal Aid Clinics, Journal of Legal Education, Summer, (1951), Vol. 3 No. 4, pp.535-554. Available at https://www.jstor.org/stable/42890509?seq=1 accessed on 12 October 2020.

Egerton University Faculty of Law Clinic (FOLLAP)

The Egerton University Faculty of Law was established in 2015 and its undergraduate program accredited in February 2016. FOLLAP was established in October 2019 to enable the marginalized people within Nakuru County to access justice and to establish a structured legal aid service within the county while providing clinical legal education to its students[63]. FOLLAP aims at providing legal services to marginalized persons especially the poor, persons living with HIV/AIDs, persons living with disabilities, the youth and women within Nakuru County. Some of the objectives include enhancing access to justice for the poor and marginalized, building sustained and structural Legal Aid Services, empowering the community to identify and report human rights and to create awareness on human rights, alternative dispute resolution and the land laws.

The Project is currently funded by UNDP-Amkeni Wakenya, a facility which provides financial and technical support to Civil Society Organizations that among others, promotes human rights[64]. FOLLAP has collaborated with other stakeholders such as LSK Rift Valley Branch, National Legal Aid Services-Nakuru, and the County Government of Nakuru in order to ensure that the members of the public have access to an efficient legal aid programme within Nakuru County[65]. The president of the Rift Valley law society, Ochang' Ajigo acknowledges the role played by students, under supervision of advocates, during legal aid clinics and the hands-on approach adopted by FOLLAP inculcating legal skills while providing legal aid services to the community"[66]. This is clear indication of the importance of partnerships within the legal aid structures.

FOLLAP has been in operation for at least one year and has already been implemented in several sub-counties such as Nakuru Town West, Naivasha, Subukia, Molo, Bahati and Rongai. The areas of law conducted by FOLLAP are criminal matters, family matters, children welfare, land rights, public

63 Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Newsletter Vol. 1, Issue 1, July 2020.

64 https://www.ke.undp.org/content/kenya/en/home/projects/amkeni-wakenya.html, accessed on the 12 October 2020.

65 Faculty of Law Legal Aid Project, 'About FOLLAP' available at https://follap.egerton.ac.ke/explore/about, accessed on the 12 October 2020.

66 Message from the President Rift Valley Society, Mr. Ochang' Ajigo as contained in Egerton University Faculty of Law Legal Aid Project, One Year of FOLLAP, Newsletter, Vol 1. Issue 2, September 2020, pg.1.

interest matters and governance matters. The Project provides legal advice, awareness and education to the community members through a mobile legal clinic. This involves going to the people, giving them the opportunity to state their legal problems and thereafter provide the necessary assistance. The mobile clinic is run by students under guidance of faculty staff members and commissioned pro bono lawyers. The clinics provide an opportunity for students to gain practical and meaningful knowledge and skills that are crucial to their future legal practice, as well as encouraging them, to participate in community legal empowerment projects upon admission to the bar[67].

The faculty trains students for the external clinic by organizing simulated internal clinics which are supervised by faculty staff[68]. Subsequently, students are divided into groups, and under the guidance of faculty staff, provide legal assistance to clients in the mobile clinics[69]. FOLLAP also provides legal services to individuals through the embedded legal clinics at the faculty[70]. Members of the public can book a free legal aid appointment and visit the faculty for consultations on Tuesdays and Thursdays for legal assistance[71]. The law students stationed at the clinic can provide legal advice to the clients and, under proper supervision, draft legal documents such as demand letters on behalf of the clients. Additionally, clients who require further legal assistance are referred to relevant institutions, including advocates who collaborate with the Project.

Additionally, the faculty conducts training to various groups, such as chiefs, on various issues concerning human rights, including, alternative dispute resolution mechanisms. During a scheduled training, one of the chiefs mentioned that chiefs are killed while others injured in the line of duty[72]. Such testimonies are clear indicators of the need for more legal awareness and education through legal aid. The faculty also has a call centre that is operational at all times to provide legal assistance to persons who are not

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67 FOLLAP, 'Our Legal Aid Clinic Program' Available at https://follap.egerton.ac.ke/knowledge-repository/our-legal-aid-clinic-program, accessed on 10 October 2020.

68 ibid.

69 ibid.

70 The Embedded clinic operates on Tuesdays and Thursdays. Clients can book a free appointment from FOLLAP's website, available at https://follap.egerton.ac.ke/explore/appointment.accessed on 10 October 2020.

71 FOLLAP, 'Appointment', Available at https://follap.egerton.ac.ke/explore/appointment, accessed on 10 October 2020.

72 Francis Mureithi, Egerton University trains chiefs on dispute resolution Daily *Nation*, (6 February 2020-updated 29 June 2020).

able to physically access the legal clinics[73].

Since its establishment, FOLLAP has reached over two thousand beneficiaries through its different activities[74]. The project has conducted 8 legal clinics in several sub-counties, 5 trainings and 6 public forums for different groups of people such as grassroot and community leaders, women and youth[75]. Various legal mobile aid clinics have been conducted in Naivasha, Kabazi, Kampi ya Moto, Rurii location, Witethie, Hell's gate, Bahati, Subukia, Shabab, Kiamunyi and Ruiyobei in Rongai within Nakuru County[76]. FOLLAP has trained 40 chiefs selected from Nakuru West, Subukia, Naivasha, Molo, Bahati and Rongai Sub-counties on legal aid to equip them with effective problem solving mechanisms as well as ensuring the community has awareness and access to basic legal aid information[77]. An assistant chief who participated in the mediation training indicated that she had been equipped with the right skills to handle a matter which ended up to being a great success[78]. Therefore, FOLLAP has moved beyond providing legal assistance as a way of enhancing access to justice for the marginalized to educating and training them to be aware of and enforce their rights.

FOLLAP has provided an opportunity for its students, who actively participate in the legal clinics, to gain skills and knowledge critical in the law practice while giving them first-hand experience on the various challenges marginalized individuals face in accessing justice. FOLLAP is unique in how it contributes to the holistic training for the future legal professionals coming days[79]. The Project has given students a first-hand experience on how the law interplays and responds to real life situations. This is affirmed by one of

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[73] Egerton University FOLLAP, *Understanding Legal Aid*, Newsletter Vol. 1, Issue 1, July 2020.

[74] Over 2,000 beneficiaries reached through FOLLAP activities, Egerton University Faculty of Law Legal Aid Project, One Year of FOLLAP, Newsletter, Vol 1. Issue 2, September 2020, pg. 7.

[75] ibid.

[76] FOLLAP, 'Our Timeline of Activities' Available at <https://follap.egerton.ac.ke/explore/our-timeline>, accessed on 10 October 2020.

[77] Francis Mureithi, Egerton University Trains 40 Nakuru Chiefs on Legal Aid, *Daily Nation* (26 September 2020).

[78] How mediation skills are impacting communities: the case of Chief Florence Wambui in in Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Vol. 1, Issue 2, September 2020 pg 6.

[79] Message from the Team Leader and Getanda's summary on FOLLAPs contribution to Egerton's LLB Program, pg 1 and 2 as contained in Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Vol. 1, Issue 1, July 2020.

the students had this to say, “FOLLAP provides an opportunity for us to educate the community on their human rights and obligations… participating in legal aid has been an important step in my legal career… good platform to transfer the skills learnt in the classroom into practice; a forum to engage with people on a personal level and acquire useful interpersonal skills; an arena to learn about the society in general and the legal issues that need to be addressed”[80].

Although FOLLAP has made great strides towards enhancing access to justice for the marginalized communities in Nakuru County, it also has challenges. The project has focused on providing legal advice and legal awareness through the clinics. Thus, clients who seek further assistance, such as legal representation are referred to relevant institutions. Although the students gain practical knowledge while providing legal advice, they miss out on court representations. Matters are referred to *pro bono* lawyers through *the pro bono* scheme that the faculty established with the Rift Valley Law Society or taken up by a faculty staff.

FOLLAP does not have a compulsory or optional clinical education course to better equip the students for the mobile clinics. Thus, students rely on internal clinics to prepare for the actual mobile clinics. Even though the students are engaged in active internal moots as prepared by the faculty staff to prepare them for court process, this is insufficient. The Project is donor-funded and sustainability may not be viable on termination of donor support. There is no special fund dedicated to the project by the university or government.

Cross-Jurisdictional Experiences and Lessons

This section examines legal aid programmes from established jurisdictions in order to draw lessons that can strengthen Kenya’s legal aid programmes and clinical education. Jurisdictions examined are South Africa, Australia and United States of America. The Australian and USA legal aid models were selected for this study because of their near-mirror common law legal landscape which would make it easier and suitable for adoption at Kenya's municipal level. South Africa on the other hand is relevant to the studies methodological approach being an African country having a near similar constitutional provisions on legal aid. On an implementation basis therefore,

[80] Message from Ronald Kihali, “I will forever be indebted to FOLLAP” as contained in Egerton University Faculty of Law Legal Aid Project, Understanding Legal Aid, Vol. 1, Issue 2, September 2020 pg. 2.

South Africa's approach to legal aid has made commendable institutional progress.

South Africa

Article 35 of Constitution of the Republic of South Africa protects the right to legal aid of accused and detained persons at the State's expense, if substantial injustice would otherwise result. Legal aid is made available to the marginalized through State-funded legal aid institutions and civil society organizations. Legal Aid South Africa is the body mandated to offer legal aid as established by the Legal Aid South Africa Act No. 39 of 2014. The Body employs legal practitioners, candidate attorneys, paralegals and other entities through cooperation agreements, including Universities to provide legal aid[81].

South African universities have included Clinical Legal Education in their curricula so as to enhance access to justice for the poor while providing students with practical training. CLE is a compulsory course for some universities or an elective for others. For instance, the University of Witwatersrand (WITS) provides a compulsory course called Practical Legal Studies. The students attend lectures and tutorials, consult in the school's clinics, attend tutorials and work on case files[82]. On the other hand, the University of Cape Town provides an elective Legal Practice Course which provides an opportunity for students to work with real clients under the supervision of attorneys at the clinic[83]. Students attend lectures on practical aspects of law, clinics and office appointments where they consult with clients, and also participate in a mock trial before a magistrate[84]. All students at UCT must complete 30 hours of community service at a Faculty-accredited legal services provider.

The sustainability and effectiveness of legal clinics in South African Universities is enhanced by Law Clinics Associations. Many law clinics are part of voluntary associations, such as the South Africa University Law Clinics Association (SAULCA), which, among other functions provides financial

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81 Hennie van As, *Legal Aid in South Africa: Making Justice Reality*, (Journal of African Law Vol 49, No. 1, 2005).

82 Ma Du Plessis, Clinical Legal Education Models: Recommended Assessment Regimes, PER/PELJ Vol. 18, No. 7, 2015. Available at <file:///C:/Users/Stephanie/Downloads/131490-Article%20Text-354826-1-10-20160304%20(1).pdf>, accessed on 13 October, 2020.

83 University of Cape Town Law Clinic, Student Handbook, 2019.

84 ibid.

support to its members and strives to promote high quality Clinical Legal Education programs at South African universities[85]. This kind of association is however lacking in the Kenyan set up.

Australia

State funded legal-aid is available to all eligible persons through the Legal Aid Commissions (ACTs) found in the states and territories of Australia. The ACTs are independent bodies established under section 6 of the Legal Aid Act of 1977. Section 8 (2) of the Legal Aid Act enables the ACTs to provide legal assistance through arrangement with private legal practitioners, at the Commission's expense. Section 10 (j) of the Legal Aid Act encourages and permits law students to participate in provision of legal services on voluntary basis and under professional supervision.

Clinical legal education places students in the role of lawyers representing clients and therefore provides students with real-life referencing points for learning law legal problems[86]. There are five main models of clinical legal education, that is, in-house live-client clinic which is wholly funded by the law school, in-house live-client clinic with some external funding, external live-client clinic conducted in agency clinics, externships and clinical components in other courses[87].

In-house live-client clinics that are wholly funded by the law school are established for the purposes of student education. In-house live-client clinics that are partly funded by the law school with some external funding are established for student education while providing clients with legal assistance[88]. External live-client clinics in agency clinics provides an opportunity for students to learn by placing them in agency clinics under the supervision or the agency, assessed by the law school with input from the

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85 South African University Law Clinics Association (SAULCA), 'Vision, Mission and Objectives' Available at <https://www.saulca.co.za/#:~:text=South%20African%20University%20Law%20Clinics,and%20goals%20of%20its%20members>, accessed on 13 October 2020.

86 Evans A. *et al.* Australian clinical legal education: Models and definitions. In *Australian Clinical Legal Education: Designing and operating a best practice clinical program in an Australian law school* (pp. 39-66). Acton ACT, Australia: ANU Press. (2017). Retrieved 21 October 2020, available http://www.jstor.org/stable/j.ctt1q1crv4.8, accessed on the 17 October 2020.

87 ibid.

88 ibid.

agency[89]. Externships involve placing students in independent bodies such as community service centres where supervision and assessment is done by independent bodies and the law school respectively.[90] Clinical components in other courses is a model where a substantive law course includes within it a clinical section, for instance, including negotiation scenarios within the substantive law course[91].

United States of America

The 6th Amendment to the Constitution of the United States recognizes the right of an accused person to a fair trial and the right to have the assistance of counsel for his defence. The civil legal aid on the other had is not provided in law, however, the service is available to low income or middle-income individuals, enabling them to access basic necessities, for instance, on matters of family law and domestic violence.[92] Legal aid service providers include licensed lawyers who offer pro bono services, full time criminal and civil legal aid lawyers, University-based Law Clinics and Paralegals[93]. American Bar Association-Accredited law schools provide legal aid services through legal clinics which aim to provide legal services to indigents while giving students an opportunity to learn through experience by providing legal representation under the supervision of clinical faculty members[94].

All law schools in the USA are required to offer a curriculum that requires students to complete one or more experiential course(s) for at least six credit hours, that is, a simulation course, a law clinic, or field placement[95]. Further, the law school is required to provide an opportunity for law clinics, field placements and for the students to participate in pro bono legal services[96]. Standard 304 defines experiential courses provide students with substantial

89 ibid.
90 ibid.
91 ibid.
92 The United States Department of Justice, 'Legal Aid Inter Agency Roundtable-Civil Legal Aid 101' Available at https://www.justice.gov/lair/file/828346/download, accessed on the 20 of October 2020.
93 ibid.
94 William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor* (Akron Law Review, Vol. 28:3 1995).
95 American Bar Associations 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, standard 303 (a).
96 ABA 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, standard 303 (b).

experience similar to the experience of actual lawyers including advising and representing clients, in the case of law clinics. The Standard further requires the courses to include a classroom instructional component such as scheduled tutorials, supervision and feedback from a faculty member or site supervisor. By making clinical legal education compulsory in all law schools, all law students have an opportunity to gain practical experiences that will adequately prepare them for actual practice.

Perhaps the most notable feature of the clinical legal education curriculum is the opportunity for certified students[97] to appear in court on behalf of their clients. In the state of California, certified students appear in court on behalf of the client in depositions or on various matters listed in the California Rules of Court, including in any public trial, hearing or arbitration; and to appear on behalf of a government agency in the prosecution of criminal actions for minor offences or infractions including any public trials[98]. Other states such as Michigan permits students, as members of a legal aid clinic to appear in any Michigan court except the Supreme Court on behalf of a client provided the indigent person consents in writing to the representation[99]. Permitting students to actively participate in court activities gives them even more experience and thus prepares them adequately for the legal practice. This is a good practice that Kenya can emulate.

Provision of Legal Aid and Implementation Challenges

While Kenya has shown her commitment to upholding the rights of the poor and marginalized, there are several challenges that impede establishment of a sustainable legal aid system. They include:

Limited Funding

The Act establishes the Legal Aid Fund which consists of monies allocated by parliament for the purposes of legal services, grants, gifts, donations and loans and other lawful sources of funds[100], however, the Fund is yet to be operationalized. Legal aid clinics therefore, have to seek private sources of funds which are inadequate to conduct large scale legal clinics. The

97 California Rules of Court, r 9.42 defines a certified student as a law student who has a currently effective certificate of registration as a certified law student from the state bar.

98 California Rules of Court 2013, r 9.42. The Rules also requires the students to be accompanied by a supervising attorney who is a member of the State bar.

99 Michigan Court Rules 2013, r 8.130 (D).

100 Legal Aid Act 2016, s 29 (2).

government should avail funds to run all legal aid clinics including those run by the law schools.

Lack of Awareness

Many individuals are unaware that they have a right to legal aid. The Global Study on Legal Aid reported that 78% of Respondents in Sub-Saharan Africa were not aware that they can receive legal aid services at no cost[101].

Lack of Confidence in the Justice System and the Quality of Legal Services

Many indigent persons lack confidence in the formal justice system and opt for informal justice systems which do not require the assistance of legal service providers unless they are recognized as alternative dispute resolution mechanisms by the law. Therefore, limiting the services they can receive from legal aid service providers. There is an assumption that legal services provided through legal aid are of poor quality since they are offered at no cost[102]. This causes many individuals to avoid seeking legal assistance from legal aid clinics.

There is a need to raise awareness that legal practitioners are bound by law to provide legal services regardless of whether the matter is being handled at a certain cost or for free. Further, students who carry out legal clinics are also given sufficient training and work under the guidance and supervision of highly competent and experienced legal practitioners.

Insufficient Number of Legal Practitioners and Centres who offer Free Legal Services

There is a limited number of legal practitioners who offer free legal services or participate in legal clinics[103]. There is disparity in the number of legal service providers to that of persons seeking legal assistance prevents the legal service providers from providing assistance to all persons in need. More funds should therefore be allocated to the provision of legal aid services. Further, more legal practitioners should be encouraged to take up cases on pro bono basis.

101 UNODC, *Global Study on Legal Aid Global Report*, 2016.
102 ibid.
103 ibid.

Lack of a Proper Clinical Legal Education Curriculum in Universities

The Kenyan clinical legal education is optional for students and thus not all students get the opportunity to gain practical legal experience, unlike other jurisdictions who either have a compulsory course for their final students or require the students to undertake community service at approved legal clinic centres. Further, the training received by students before going to external clinics is not sufficient in equipping them with the skills and knowledge required to carry out legal aid effectively. Law schools should be encouraged to introduce compulsory law-related community service in their curriculum.

Limited Services Provided by Students

The legal services provided by law students are limited to legal research, legal advice, drafting of necessary documents and providing legal awareness. However, they do not get to represent their clients in courts of law. The Kenyan law requires that all legal representatives must be advocates with valid a practising certificates[104]. This limits the clinical legal education received by students who do not get to practice in actual courts. The Legal Aid Act should be reformed to give students the opportunity, under supervision from advocates, to represent clients in courts. This will give them an opportunity to sharpen their advocacy skills and prepare them for actual practice while enabling the clients to have their legal needs from start to completion.

Lack of University Legal Aid Association

Kenya does not have a common association to unify all law schools that conduct legal clinics. As seen in South Africa, legal clinic associations such as SAULCA provides an opportunity for legal clinics to work together to provide legal services, to provide financial support for the running of legal clinics, to facilitate access to justice, to assist legal clinics in the provision of their services and to ensure the legal services they provide are quality.[105] Kenyan law schools need to come together and form an association where they can join and participate voluntarily.

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[104] Advocates Act Cap 16 Laws of Kenya, sec 9.

[105] South African Universities Legal Aid Clinics Association (SAULCA), Vision, Mission and Objectives. Available at https://www.saulca.co.za/, accessed on 22 October 2020.

CONCLUSION

This paper has highlighted the key role university legal clinics play towards bridging the gap between indigent and able Kenyans to access to justice by providing the experience of FOLLAP. This is a project established to provide free legal services to indigent persons while promoting practical or hands on learning for the law students through interacting with the social problems the community face in preparation of their future career in the profession.

The diverse nature of FOLLAP enables it to provide a wide range of services to the community and therefore positively impacts access to justice for members of the community in Rift Valley. The same can be borrowed and applied by legal aid providers including other law schools across the country, where legal aid is not limited to providing legal advice and court representations, but extends to legal awareness as well as training community members and the leaders on the law.

The paper has also looked at unique features in legal aid programmes in other jurisdictions such as South Africa, Australia and the United States which have enabled them to develop sustainable legal aid systems. These include provision of practical legal courses, and opportunities to represent clients in court. Kenya can incorporate such best practices in order to establish a sustainable legal aid system which benefits marginalized persons in the society as well as law students.

In conclusion, university legal aid clinics play a pivotal role in the development and reform of the justice sector by facilitating equal access to justice to all citizens by providing legal assistance to the poor and marginalized who would otherwise lack the capability to claim and enforce their legal rights and interests. The legal aid clinics also have a core role in advancing the legal knowledge of law students by imparting practical skills and awareness that builds a strong foundation for their law practice and shape them to be practitioners that champion the rights of the poor, vulnerable and marginalized groups in the society. There is need for advocacy for law reform, particularly the Legal Aid Act and the Advocates Act to allow students to take up cases and represent clients in the lower courts under the guidance of an advocate who can either be a faculty staff or advocate from private practice to strengthen this noble cause.

Developing Alternative Pathways to Enhance Access to Justice through Incentivised Pro Bono and Legal Aid Services in Kenya

Strathmore Law Clinic*

ABSTRACT

Kenya's Constitution seeks to trigger a shift from past ethical crises, repression, and authoritarianism to a future characterised by renewed ethical values, respect for human rights and citizen emancipation. The right of access to justice as well as fair trial - in particular the right to legal representation - are two hallmarks of the transformative rights-based philosophy. The government has the positive duty to ensure that all Kenyans can access justice. However, as a defence for non-performance in meeting this obligation, the State often invokes the 'progressive realisation of rights' mantra. This is, in principle, an implicit concession of the lack of access to justice, calling for the development of innovative modes of ensuring that underprivileged Kenyans can enjoy the promise of the Kenyan Constitution. This study explores a new avenue to enhance pro bono legal services in Kenya, incentivised pro bono. The definition of incentivised pro bono adopted entails the use of various motivating factors that encourage duty bearers within the legal sphere to carry out legal aid. It is unique in that it uses a 'meet me half-way approach' and targets two key duty bearers in the legal sphere - lawyers and students. The incentives explored by this study include the use of CPD points and tax incentives for lawyers and the implementation of credit systems within law schools to encourage law students to play an active role in legal clinics.

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Keywords: Government, Incentivised Pro bono, Lawyers, Legal Aid, Students

INTRODUCTION

Access to justice is a framework of legal protection that results in the fair and effective adjudication of disputes, involving the availability of legal services and remedies[1] in accordance with human rights.[2] It aims to achieve justice for all irrespective of status.[3] It is only within such an environment that the rule of law can flourish. Access to justice is acknowledged as a right in the Constitution of Kenya, 2010 (hereinafter 'the Constitution') with Article 48 expressly stipulating that, 'the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.[4] This provision is the backbone of legal aid in Kenya.[5] Article 48 is in line with provisions of the International Covenant on Civil and Political Rights (ICCPR), which provides for equality before the courts and adequate time and facilities to prepare a defence.[6]

Further, Article 50 of the Constitution affords the right to a fair hearing. It provides that every accused person has the right to a fair trial, which includes the right 'to have an advocate assigned to the accused by the State and at the State's expense, if substantial injustice would otherwise result, and to be informed of this right promptly'.[7] Article 25 includes the right to a fair trial and Article 27 provides for equality amongst all persons before the law.[8] These additions are laudable as they create a firm foundation for advocacy and

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1 Thomas Hansen, 'Access to Justice and Legal Aid in East Africa' (Page 16, Danish Institute for Human Rights 2011).

2 Emmah Wabuke, Arnold Nciko and Abdullahi Abdirahman, 'Promoting access to justice in Kenya: Making the case for law clinics' (The Platform, 11 October 2018) < https://www.theplatform.co.ke/promoting-access-to-justice-in-kenya-making-the-case-for-law-clinics/ > accessed on 27 December 2020.

3 *Paul Pkiach Anupa & Another v Attorney General & Another* (2012) eKLR High Court at Nairobi.

4 ibid.

5 Office of the Attorney General and Department of Justice, 'National Action Plan Legal Aid 2017 – 2022 Kenya: Towards Access to Justice for All' (Page 4, 2017).

6 International Covenant on Civil and Political Rights, 16 December [1966], 999 UNTS 171, art 14.

7 Constitution of Kenya 2010, art 50(2) (n).

8 ibid art 25 (c). See also, Constitution of Kenya 2010, art 27(1). See also, Constitution of Kenya 2010, art 27(2).

promotion of access to justice.[9] However, access to justice in Kenya has been plagued by a plethora of problems including but not limited to; high court fees and high fees to contract for services from a legal advisor, geographical proximity to legal establishments, complexity of rules and procedure, use of legalese, gender and language barriers, understaffing, lack of financial independence, lack of effective remedies, lack of knowledge of basic rights and a backlog of cases that delays justice.[10]

In light of the Corona Virus pandemic, the impact of which was felt the world over, there arose a need to scale down court activities to help curb the spread of the disease.[11] This led to disruption in filing, hearing and determination of cases, adding to the existing backlog.[12] All the while, cases involving at risk groups continued to rise; an example being the surge in cases of gender-based violence.[13] The attempt to shift to online platforms to help mitigate the risks associated with the Corona Virus Pandemic, well intended as this may have been, led to further delays in the administration of justice.[14] This was due to inadequate internet support system, insufficient equipment and poorly trained personnel.

In cognizance of the fact that many underprivileged people are unable to access legal services, legal aid is put in place by a government to address this problem.[15] It refers to the support given by government to people who are

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9 Office of the Attorney General and Department of Justice, 'National Action Plan Legal Aid 2017 – 2022 Kenya: Towards Access to Justice for All' (Page 3, 2017).

10 Jackton Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development', (2007) 1(19) Kenya Law Review 19; Francis Kariuki and Muigua Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya,' (2015) 1SLJ 1, < http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> on 23 December 2020.

11 *State of the Judiciary and Administration of Justice Annual Report 2019-2020* (Ninth Edition, Page 12, Judiciary of Kenya, 2020).

12 *State of the Judiciary and Administration of Justice Annual Report 2019-2020* (Ninth Edition, Page 312, Judiciary of Kenya, 2020).

13 National Crime Research Centre, *Protecting the Family in the Time of Covid-19 Pandemic: Addressing the Escalating Cases of Gender Based Violence, Girl Child Disempowerment and Violation of Children Rights in Kenya*, (National Crime Research Centre, 2020) 13.

14 *State of the Judiciary and Administration of Justice Annual Report 2019-2020* (Ninth Edition, Page 312, Judiciary of Kenya, 2020).

15 Muigua Kariuki, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (2018), 4 <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-

not able to afford legal services.[16] Legal aid thereby ensures access to justice by securing the right to a fair trial.[17] It is important to note, however, that the Kenyan government is only obligated to provide lawyers to capital offenders before the High Court and juvenile offenders, who do not have access to legal representation.[18] This situation, among other factors, has allowed for the enhancement of access to justice to develop at a painfully slow rate. As opined by Majanja J, 'Without access to justice, the objects of the Constitution, which is to build a society founded upon the rule of law, dignity, social justice and democracy, cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized.'[19]

This study will attempt to discuss ways to supplement the government's role in enhancing access to justice in Kenya. The means stressed involve the creation of incentives as a contingent motivator for students, lawyers and law firms to participate in the promotion of access to justice, subsequently creating a sustainable pro bono culture in Kenya. The incentives the study will explore include 1) widening the scope of earning CPD points for lawyers through pro bono work; 2) creating a sui generis tax incentive regime for lawyers and law firms and 3) setting up law clinics and implementing a credit and award system for students to encourage them to take an active role within the various law schools in Kenya.

The paper will proceed in the following manner: Part II shall discuss the capability approach theory as the lens through which access to justice can be viewed, assessed and achieved. Part III shall discuss legal aid and pro bono

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DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> accessed on 24 June 2020; Emmah Wabuke, Arnold Nciko and Abdullahi Abdirahman, 'Promoting access to justice in Kenya: Making the case for law clinics' (The Platform, 11 October 2018) < https://www.theplatform.co.ke/promoting-access-to-justice-in-kenya-making-the-case-for-law-clinics/ > accessed on 27 December 2020.

16 Herbert Mwaura, 'Pro bono Practices and Opportunities in Kenya' (Latham and Watkins LLP, May 2019) <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya-2.pdf> accessed on 20 October 2020.

17 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 14.

18 Practice Directions Relating to Pauper Brief's Schemes and Pro Bono Services (Gazette Notice No. 370). See also, United States Department of State, 'Country Reports on Human Rights Practices', Kenya (2006) 7.

19 Kenya Bus Services Ltd and Another vs Minister for Transport & 2 Others (2012) eKLR.

in Kenya, analyse existing government interventions in the area and highlight various avenues by which the government can interface with other players in the provision of legal aid services. Part IV and V will, respectively, discuss the role of lawyers and students introducing ways in which these stakeholders can be incentivised to take part in activities that will enhance access to justice in Kenya.

The Capability Approach and Access to Justice

The capability approach is a theory of social justice that places the individual's freedom at its centre and draws from classical conceptions of human action.[20] It emphasises one's ability to choose and the realisation of these choices towards meaningful action as its primary point of measure. This approach to access to justice carries broad theoretical and practical implications. It offers a relatively novel perspective for viewing access to justice as well as a means of evaluation of its permeation. It is also among theories that allows by-passing, to some degree, of notions of 'progressive-realisation' based on a country's fiscal capacity; it deemphasises gross national product and other such measures as the primary indicator of development in a country.[21] The theory was propounded by Amartya Sen and makes two main claims: the first is that human freedom is both the primary end and principal means of development[22] and the second is that the well-being of a society should not be measured by levels of income but by capabilities resulting in functioning.[23] Capabilities have been defined by Sen as the alternatives within the command of an individual to achieve the things that one may value doing or being.

Martha Nussbaum, expounding on Sen's theory, created a list of ten basic capabilities key to every individual's wellbeing. Examples include life, bodily health, sense of imagination and thought, and emotions.[24] These basic capabilities are elaborated within a taxonomy of three: basic capabilities,

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20 Amartya Sen, *Development as Freedom* (OUP 1999) 21.
21 ibid 43-44.
22 ibid 36.
23 Ingrid Robeyns and Morten Fibieger Byskov, 'The Capability Approach', (Winter Edition, The Stanford Encyclopedia of Philosophy, 2020) <https://plato.stanford.edu/archives/win2020/entries/capability-approach/> accessed 27 December 2020.
24 Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review 273.

internal capabilities and combined capabilities.[25] The first involve the innate equipment of the individual for the development of other capabilities, the second involves the 'real time' state of an individual that allows one to exercise the requisite functions and the last involves a combination of internal capabilities and *external factors* that permit that individual to exercise a function.

This theory by Sen and Nussbaum has been advanced in different ways in relation to access to justice. Promit Chatterjee and Sreerupa Chowdhury, for instance, argue that access to justice, while not explicitly present in either Sen or Nussbaum's conceptions, is a central and basic capability.[26] This is premised on the notion that access to justice enhances the enjoyment of other basic rights by assuring one of a fair redressal mechanism in case of violation.[27] Access to justice adopts a wider definition, from mere representation in courts, to encompass access to legal information, legal advice, and legal knowledge. It contributes to the development of capabilities by equipping people with knowledge of society's rules, compliance with which makes for a dignified life, and avoidance as well as effective resolution of conflicts.[28] Marco Segatti on the other hand has offered an assessment of access to justice as a combined capability per Nussbaum's categorisation.[29] He makes the assertion that access to justice requires the development of internal capabilities such as; the ability to read, speak and understand the language in which one's legal rights are written as well as the ability to aspire to legal protection of the law; and external factors such as the availability of courts and collaboration and coordination of activities with other players in the legal space, such as lawyers.

These conceptions have in common that access to justice requires to be viewed as an integral factor in the realisation of a broad range of rights and as a spectrum of factors when it comes to its realisation. This reveals a need to involve a wide range of players in order to realise a just society; including the government, members of the legal profession and law students. The

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25 ibid.

26 Promit Chatterjee and Sreerupa Chowdhury, 'A capabilities approach to access to justice' (2012) 4 Indian Law and Society, 107.

27 ibid.

28 ibid.

29 Marco Segatti, 'A Capabilities Approach to Access to Justice; Unfulfilled Promises, and Promising Strategies in the US and in Europe' (2016) 6 Teoria politica. Nuova serie Annali, 335.

government may play a central role in creating systems that would allow for access to facilities, legal information and legal representation through, for example, operationalising systems that are already in place. Lawyers and law firms may aid the endeavour by taking up more pro bono cases to support the indigent in society. Law schools and law students may play a part by providing legal information in a manner that is comprehensible to members of the society and through creating legal awareness that gives rise to aspirations for the protection of the law. It is through this multi-faceted approach that access to justice can be strengthened.

Legal Aid and Pro Bono Legal Services in Kenya

Pro bono is short for the Latin phrase *pro bono publico*, which means 'for the public good; for the welfare of the whole'.[30] It refers, in law, to legal services performed free of charge or at reduced fees for those who cannot afford representation.[31] In practice, as in this paper, pro bono is also referred to as legal aid or legal assistance except when describing publicly funded aid, that is, government-initiated programs.[32] Publicly funded legal aid schemes differ from pro bono, as in the former the government provides some form of pecuniary compensation while pro bono services are performed free of charge.[33]

Legal assistance is essential to the right to a fair hearing as it ensures that disadvantaged persons are not denied representation out of a lack of means to hire competent counsel.[34] Notwithstanding, the criterion established by the Constitution to qualify for legal assistance may be viewed as ambiguous; it leads to questions as to what would amount to substantial injustice and by

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30 Black's Law Dictionary, 4th ed.

31 Sally Kane, 'The Definition of Pro Bono in Law' 25 June 2019 -- <https://www.thebalancecareers.com/what-does-pro-bono-mean-2164411> accessed on 24 June 2020.

32 Latham and Watkins, 'Pro Bono Practices and Opportunities in Kenya' (Pro bono Institute, 1 May 2019) <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya-2.pdf > on 22 November 2020.

33 'Legal Aid Cuts: A Future of Mandatory Pro Bono Work?' (23 November 2017) < https://eachother.org.uk/legal-aid-cuts-future-mandatory-pro-bono-work/> on 9 April 2021.

34 John Osogo Ambani and Morris Kiwinda Mbondeyi, *The New Constitutional Law of Kenya: Principles, Government & Human Rights,* (Nairobi, ClariPress Ltd, 2012) 194.

what measure would one identify an accused person that is deserving of state funding. Consequently, the stipulations given are susceptible to be interpreted in a narrow manner contrary to the spirit of the Constitution. There has been an attempt to answer the latter of these questions through the Practice Directions on Pauper Briefs and Pro Bono services.[35] However, the threshold required to prove such a condition, 'paupership', is high with a high evidential burden on the applicant.[36]

The Role of Government: Present Interventions by the State in Legal Aid Provision

The National Legal Aid Service

The Legal Aid Act of 2016 established the National Legal Aid Service (herein NLAS or the Service).[37] NLAS is established as a successor to the National Legal Aid and Awareness Program (herein NALEAP or the Program).[38] The main aims of the Program are to create awareness with the Kenyan public about legal aid and to provide legal advice and representation to the poor, marginalized and vulnerable in the Kenyan society.[39] NALEAP was a significant step in the development of a state-led approach to the provision of legal aid in Kenya. The Program saw to the development of the Legal Aid Bill in 2012, that eventually became the Legal Aid Act 2016, as well as a National Legal Aid Policy in 2013.[40]

The statutory mandate of the NLAS is wide.[41] Broadly, the Service exists to promote access to justice and to steward legal aid provision in Kenya. In its role as advisor to the Cabinet Secretary on legal aid, it offers a direct link to the policy setting branch of government. In fulfilling its role to promote the establishment and working of legal aid services in various learning institutions, the Service is well suited and positioned to penetrate law schools and work with or help establish law clinics. Additionally, in facilitating the representation of persons granted legal aid, the NLAS can collaborate with

35 < http://kenyalaw.org/kl/index.php?id=6006> accessed on 5 May 2020.
36 *John Mbugua & Another v Attorney-General & 16 others* (2013) eKLR Supreme Court of Kenya.
37 Legal Aid Act 2016, s 5 (1).
38 Legal Aid Act 2016, s 5 (3).
39 <https://www.statelaw.go.ke/national-legal-aid-service/> accessed 11 May 2020.
40 Christine Nanjala, 'Determinants of effective legal aid service delivery in Kenya' (2013) 1 International Journal of Social Sciences and Entrepreneurship,271.
41 Legal Aid Act No.6 of 2016, s 7.

law firms, through legal aid departments. All the legal aid provided would be accredited by the NLAS Board as required in Section 56 of the Act. The Legal Aid Act further provides for a Legal Aid Fund managed by the NLAS towards the fulfilment of its functions and gives an expansive and specific list of persons eligible requirements for persons seeking to benefit from the services of the NLAS.[42] For these reasons, the NLAS is uniquely suited, in theory, to facilitate the promotion of legal aid culture through both unilateral and collaborative initiatives.

Despite these provisions, access to legal assistance does not appear to have significantly improved.[43] The provision of legal aid has in the past been severely underfunded in comparison to other offices and branches within the government that play a role in dispensing justice.[44] Evidence exists from the *2018 East African Regional Legal Aid Conference* in Nairobi, suggesting that this is still the case and may be inferred as a key factor in the underperformance of the NLAS.[45] Secondly, seeing as these provisions for legal aid, though limited, are now available, the situation could be attributed to ignorance to the services available as access to information is a critical step in the legal empowerment of disadvantaged groups and indigent persons.[46] Finally, the minimum requirements given in Section 36 of the Legal Aid Act are restrictive as they exclude foreign nationals who may need legal representation even in cases where it may occasion substantial injustice; an example being in deportation matters. With a good concept on paper but bad implementation, the Legal Aid Act fails to fulfil its function. [47]

The Role of Lawyers in Enhancing Access to Justice in Kenya

Law firms take up pro bono cases from time-to-time and the Law Society of Kenya, in conjunction with the Judiciary, offers annual legal aid and pro bono services over several days at its branches throughout Kenya. This notwithstanding, economic factors bear down heavily on purely pro bono

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42 Legal Aid Act No.6 of 2016, s 36(1).

43 https://www.capitalfm.co.ke/news/2020/12/judiciary-appeals-for-partnership-to-expand-legal-aid-access/ accessed on 7 January 2021.

44 Office of the Attorney General and Department of Justice, 'National Action Plan Legal Aid 2017 – 2022 Kenya: Towards Access to Justice for All' (Page 20, 2017).

45 https://www.the-star.co.ke/news/2018-11-05-many-needy-kenyans-denied-legal-aid-ag/ accessed on 7 January 2021.

46 Migai Akech, *Administrative Law* (Strathmore University Press 2016) 39.

47 Legal Aid Act No.6 of 2016, s 36(1).

driven initiatives and cause strain. Lawyers may initiate cases for the underserved community but can only take them so far without financial support. According to Rule 8 of the Practice Rules for Pro Bono Services, the legal fees that can be levied, Ksh.30,000 all-inclusive, is lower than market value, making legal aid naturally unattractive to many advocates.[48] Pressures of the market system also affect the type of pro bono cases that law firms are willing to take up as well as the amount of time they are willing to invest in such projects.[49] Lawyers and law firms are currently not required to dedicate any number of hours towards providing legal aid services.[50] It is therefore not surprising that most law firms in Kenya are widely understood to serve the narrow, often money-oriented interests of the privileged.[51] The unwillingness of advocates to represent clients on a pro bono basis remains a major constraint which near guarantees that indigent persons remain without legal representation.[52] This section explores the development of a *sui generis* tax system and the use of CPD points as avenues through which lawyers can be encouraged to take up pro bono cases.

A *Sui Generis* Tax Incentive Regime for Lawyers and Law Firms

Tax incentives are tools used by governments to achieve certain economic and socio-economic goals within their jurisdictions.[53] They can be used to correct market inefficiencies associated with the externalities of various economic activities or target industries; whose activities have an impact on the wider public.[54] Tax incentives may take the form of tax deferrals, exemptions, credits, and allowances which are offered as an enticement to

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48 Practice Rule 2016 <http://kenyalaw.org/kl/index.php?id=6006 > accessed on 2 August 2020.

49 Scott Cummings, 'The Politics of Pro Bono,' [2004] UCLA Public Law and Legal Theory Series 116.

50 https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya-2.pdf> accessed on 24 June 2020.

51 Anne Juergens and Diane Galatowitsch, 'A Call to Cultivate the Public Interest: Beyond Pro Bono' [2016] Washington University Journal of Law and Policy 96. <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1927&context=law_journal_law_policy> accessed on 24 June 2020.

52 *State of the Judiciary and Administration of Justice Annual Report 2017-2018* (Seventh Edition, Page 410, Judiciary of Kenya, 2019).

53 United Nations, 'Design and Assessment of Tax Incentives in Developing Countries', (United Nations, 2018).

54 United Nations ESCAP, 'Tax Incentives and Tax Base Protection in Developing Countries', (United Nations ESCAP, 2017)

engage in a specified activity for a certain period of time.[55] Creating a tax incentive system for lawyers may be a potential solution to enhancing access to justice for the indigent in Kenya. A specific incentive that would suit lawyers practicing pro bono would be in the form of a tax deduction. A deduction lowers a person's tax liability by lowering their taxable income. The Kenyan Income Tax Act already allows for the deduction of expenses that are incidental to the business for the purposes of lowering the income tax payable.[56]

Therefore, firms that do pro-bono work just treat these incidentals as part of their operational expenses and deduct them as such. However, the incidentals tend to be minor expenses. In the instance where it is a legal advisory brief, some of the expenses incurred will be printing costs and other lesser amounts that may just be a little over Ksh.1000. Incidentals tend to be slightly higher in the event where a particular case mandates court representation. The expenses incurred in this case will be transport fees and court fees. However, such deductibles are not enough to incentivise lawyers to dedicate associate and partner hours to pro-bono work, hence the need for the creation of a tax incentive system for lawyers especially in developing countries.[57]

Flowing from the above, this paper proposes an incentive that would work like a charitable deduction. A charitable deduction can work in the following manner, if you earn Ksh.50,000 and make a Ksh.1000 donation to a registered charity during that year, you are eligible to claim a deduction for that donation, reducing your taxable income to Ksh.49,000.[58] The question then becomes whether the value of your time, services and incidental expenses incurred providing pro bono legal services can qualify as a charitable deduction. Within Kenya's current tax regime, the simple answer is no. The Income Tax Act allows the Minister to make rules prescribing anything that would aid in implementing the provisions of the Act.[59] Subject to this, the

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55 International Monetary Fund, 'Kenya Fiscal transparency evaluation update' (Fiscal Affairs Dept, 15 January 2020 https://www.imf.org/en/Publications/CR/Issues/2020/01/13/Kenya-Fiscal-Transparency-Evaluation-Update-48941 accessed on 29 November.

56 Income Tax Act 2012 s 15.

57 Rafiq Ahmad, 'Incentive Taxation for Economic and Social Development' (1973) 11(2) Pakistan Economic and Social Review 154.

58 Income Tax Act 2012, s 15(2)(w).

59 ibid s 130.

Charitable donation regulations were created to guide the implementation of section 15(2)(w) of the Act.

The regulations set out very specific criteria of what can be deducted. It must be a non-refundable cash donation or cheque given to a charitable organisation that is of a public character and has been established for the purposes of carrying out a public function.[60] For the deduction to be allowable, the taxpayer must show proof in the form of a receipt certified by the recipient, and it is further accompanied by an exemption certificate issued by the Commissioner to the organisation.[61] Pro bono cases cannot qualify for a charitable deduction in the instance where the client presents the case to the law firm or lawyer as a sole individual not tied to any approved charitable organisation. This is as with all tax incentives; certain requirements must be satisfied before it can be allowed and there are limitations on what amounts can be deducted.[62] Therefore, there needs to be a *sui generis* system created for lawyers as this would lead to a revision in the way lawyers view pro bono work. Where pro bono work becomes a way of reducing their tax liability rather than its perception as a financial burden.[63]

How it would be Implemented

Under the Legal Aid Act, a person or organisation wishing to provide any legal aid services must first be accredited by the NLAS.[64] Through this accreditation the NLAS can then monitor and regulate the activities carried out by the legal aid providers. A legal aid provider may claim for payment from the NLAS for services which is further subjected to audits to ensure it is in accordance with the approved rates and the agreement that was signed.[65] This system would also reduce from some of the complexities of having to calculate what work

60 Income Tax (Charitable Donations) Regulations 2007, s 2.
61 Income Tax (Charitable Donations) Regulations 2007, s 3(2)(a).
62 Jason M Thiemann, 'The Past, the Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law' (2005) 26 Hamline J Pub L & Pol'y 331.
63 Jelaina Germain, 'Legal Services Supply Gap in Saskatchewan: Temporarily Offering Tax Incentives to Lawyers for Providing Pro Bono Services' (22 October 2019) https://www.lawsociety.sk.ca/saskatchewan-law-review-articles/legal-services-supply-gap-in-saskatchewan-temporarily-offering-tax-incentives-to-lawyers-for-providing-pro-bono-services/ accessed on 8 April 2021.
64 Legal Aid Act 2016, s 59.
65 ibid s 77.

would result in a tax deduction. Limitations would, however, need to be implemented to avoid abuse of the system as a tax avoidance mechanism.[66] This paper proposes that instead of having legal aid providers claim for a certain amount, they can also choose to have the set amount treated as a deduction for the purposes of lowering their taxable liability. The NLAS, through its current payment system, could audit the quality and the value of the services offered by the legal aid provider[67] then make the recommendation to the KRA with all the accompanying documents indicating proof that the service was carried out. This would require the creation of a tax law that would allow for such a deduction. Lawyers dedicate fewer resources and time to cases when they do take up pro bono but a tax incentive that reflects their hourly contributions, should encourage them to dedicate more prudence to their pro bono clients.[68] This would also foster reporting mechanisms for pro bono activities leading to numerous positive effects.[69]

Potential Challenges

Even with such an incentive, law firms and lawyers may not be willing to take part in the scheme and may question whether the benefits outweigh the costs. This would be especially true if the process for accreditation is tedious and time consuming. To curb this, the NLAS should automate the system and make the process smooth and efficient. Bureaucracy in the recommendation process between the NLAS and KRA could also delay the lawyers' claims and discourage them from taking up more pro bono cases. The proposed tax law should therefore have timelines guiding how long the approval process should take.

Secondly, gathering enough institutional support to amend legislation from parliament would be difficult. Especially when there remains lingering questions on whether the systems effects would be far-reaching enough to

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66 Peter D Baird, 'Charitable Deductions for Pro Bono Publico Professional Services: An Updated Carrot and Stick Approach ' (1972) 50 Tex L Rev 444.

67 ibid.

68 William G Walker, 'The Private Bar, the Public Interest, and Tax Incentives: Monetary Motivation for Action' (1971) 13 Ariz L Rev 959.

69 'Informational Report on Mandatory Reporting of Pro Bono Work and of Contributions to Legal Services Organizations' < http://nylawyer.nylj.com/adgifs/decisions14/062014report.pdf > accessed on 16 April 2021.

cultivate a pro bono culture.[70] For it to succeed, it would need to be very well structured by the aforementioned bodies and authorities. Furthermore, there are instances in the Kenyan context where there is a lack of transparency in regard to tax incentives leading to public distrust. This is despite the fact that tax incentives result in substantial losses in future and current tax revenue. [71] Tax incentives should ideally be recommended where a public good is provided or to achieve desirable social activities, [72] and improving access to justice falls within this ambit.

Finally, this scheme will be highly dependent on the NLAS. As it is now, the Legal Aid Act is yet to be operationalised due to lack of adequate systems and funding.[73] An inadequate institutional framework may result in lawyers and law firms using pro bono work to evade tax. The NLAS has a role to play as a check to ensure pro bono incentivisation does not result in financial impropriety. There would also be greater costs to the NLAS to ensure compliance and enforcement of this regime. This includes spending resources to monitor this tax incentive scheme.[74] This would be a major caveat to the implementation of such a system and steps must therefore be taken to operationalise it.

Incentivising Lawyers to Practice through CPD points

It is important to note at this point that Rule 5 (11) of the Advocates (Continuing Professional Development) Rules, 2014 states that regular or pro bono legal work is not an approved Continuing Professional Development (CPD) activity, with the exception of legal work that is for the purposes of the

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70 Jason M Thiemann, 'The Past, the Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law' (2005) 26 Hamline J Pub L & Pol'y 331.

71 'Tax Competition in East Africa: A Race to the Bottom? Tax Incentives and Revenue Losses in Kenya' (Tax Justice Network-Africa & ActionAid International, May 2012).

72 ibid.

73 Emmah Wabuke, Arnold Nciko and Abdullahi Abdirahman, 'Promoting access to justice in Kenya: Making the case for law clinics' (The Platform, 11 October 2018) < https://www.theplatform.co.ke/promoting-access-to-justice-in-kenya-making-the-case-for-law-clinics/ > accessed on 27 December 2020.

74 Eric Zolt, 'Tax Incentives and Tax Base Protection Issues' (UN Draft Paper No. 3, United Nations May 2013) https://www.un.org/esa/ffd/wp-content/uploads/2014/10/20140604_Paper3_Zolt.pdf accessed on 10 April 2021.

Legal Aid Programme.[75] The Rule goes further to stipulate that the CPD Committee is mandated with crafting a framework for earning points for legal work for the Legal Aid Programme. No evidence has been found indicating that the Committee has done so.

Every member of the Law Society of Kenya must obtain a minimum of five CPD units in each CPD year.[76] The Rules make express stipulations as to the purpose of continuing professional development, among them; to maintain, improve and broaden the professional knowledge and skills of advocates.[77] This study postulates that the exclusion of pro bono work (outside of work for the Legal Aid Program) from CPD activities may be, in addition to possible regulatory challenges, a result of a narrow construction of the aims that may be achieved through CPD. While broadening knowledge and sharpening personal skills is critical for the ever-evolving legal profession,[78] this study puts forward that emphasis ought also to be placed on the notion that CPD may be used to supplement the development and progress goals of the country.[79]

Implementing CPD Incentives

The National Legal Aid Service has the mandate to develop guidelines and standards for legal aid schemes by Non-Governmental Agencies.[80] The Service may create opportunities for lawyers to offer aid in their area of expertise and at preferred locations, acting as a conduit connecting law firms and lawyers with legal aid applicants.[81] This may be done by conducting outreach, client education and holding initial client screening.[82] In order to participate in the scheme, the NLAS Board will require the lawyer to apply to

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75 Advocates (Continuing Professional Development) Rules 2014, rule 5 (11).
76 Advocates (Continuing Professional Development) Rules 2014, rule 4(a).
77 ibid rule 3.
78 Magdalene Munyao, 'Reaction of Advocates Based in Nairobi on the Relevance of the Compulsory Continuing Legal Education Programme' (Research Project, University of Nairobi 2008).
79 Cynthia Lariene, 'The Importance of Continuing Professional Development/Continuing Legal Education for You, Your Practice and Your Country' (7 November 2017) <https://www.ilfa.africa/the-importance-of-continuing-professional-development-continuing-legal-education-for-you-your-practice-and-your-country/> accessed on 14 April 2021.
80 Legal Aid Act 2016, s 7(g).
81 Scott Cummings, 'The Politics of Pro Bono' [2004] 52 UCLA Law Review 1, 42.
82 ibid.

be accredited.[83] This will give room for lawyers to practice through legal programmes initiated by the Board with, the intention of earning CPD points. The NLAS Board may work hand in hand with the CPD Committee which is tasked with determining the number of units to be awarded for such work. Rule 5 (9) also provides that the CPD Committee has power to specify the nature, content and format of the activity.[84]

Indeed, there is no guarantee that putting in place and implementing parameters that allow lawyers to accrue CPD units for pro bono services will incentivise lawyers to take up more legal aid work, but it is the author's position that such structures are an important step in the right direction. It may also facilitate a change in general attitude, or in the least growth of a new perspective, within the legal fraternity once adopted by some as a preferred point earning scheme. It is also important to note that under the legal aid program run by the LSK, lawyers give legal aid to the underprivileged and in return earn one CPD point. In the same fashion, and with the collaboration of National Legal Aid Service, lawyers may continue earning points in a more efficient, robust and consistent way.

The Role of Students in Enhancing Access to Justice in Kenya through Law Clinics

This section discusses the importance of institutionalising and incorporating law clinics into the law school curriculum. It will highlight the models used by law clinics in Kenya such as the Strathmore Law Clinic. It will also offer a comparative study of law clinics in the USA, where the use of credit incentives for students is fairly well established and documented, and South Africa, whose transformative agenda matches Kenya's to a degree and which has similar structures in place for the provision of Legal Aid. It will conclude by suggesting ways in which students can be incentivised to enrol and participate in clinical programs within their institutions.

Law Clinics in Kenya

In Kenya, there are some law schools with established legal clinics. They include The Strathmore Law Clinic, The Faculty of Law Legal Aid Project

83 Legal Aid Act 2016, s 56.
84 Advocates Act 2014, s 9(a).

(FOLLAP) at Egerton University,[85] The Students Association for Legal Aid and Research (SALAR) at the University of Nairobi,[86] Riara University Clinic and Kenyatta University Clinic which have been established in the past few years, all with the common goal of enhancing access to justice in Kenya.

The main problem facing law clinics is the failure to prioritise them in legal education systems and curriculums. The Legal Education Act lists various core courses that undergraduate law school programs should have in their curriculums.[87] Most of these are theoretical courses that are taught in class with practical approaches left to the discretion of the respective lecturers. The list, by implication, shows that law schools in Kenya are not mandated to establish law clinics within their institutions.[88] Most schools therefore opt not to spend funds in establishing legal clinics; and where there are clinics, the clinics lack recognition and adequate funding to carry out various hands-on projects.[89] This is as clinical education is merely elective rather than compulsory so it is difficult to obtain resources for law clinics if the number of students joining cannot justify the expenditure. There is therefore a requirement to institutionalise and fund law clinic programs in Kenya for them to comprehensively carry out their mandate. This can be done through incorporating legal clinical education into the curriculum.

The Strathmore Law School has taken active steps towards incorporating clinical methods of teaching in its school programs and activities. This is evidenced by the establishment of the Strathmore Law Clinic (SLC). This paper will use the SLC as a case study for Clinics in Kenya. The SLC has been chosen because the authors of this paper have been in close proximity to the institution and what it does and secondly, the Strathmore Law Clinic, despite being a young institution, has been able to carry out numerous projects all with the aim of enhancing access to justice. The institution's background, foundational principles, activities and impact may inspire other law schools in Kenya to develop similar programs.

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85 https://follap.egerton.ac.ke/ accessed on 29 November 2020.

86 https://law-school.uonbi.ac.ke/basic-page/students accessed on 29 November 2020.

87 Legal Education Act 2012 s 23(1) [as read with the Second Sch].

88 Yohana Ouma and Esther Chege, 'Law Clinics and Access to justice in Kenya: Bridging the legal divide' (2016) 23 International Journal of Clinical Education 107, 116.

89 Yohana Ouma and Esther Chege, 'Law Clinics and Access to justice in Kenya: Bridging the legal divide' (2016) 23 International Journal of Clinical Education 107, 117.

A Case Study of the SLC

The SLC is a student-run and faculty supervised institution under the Strathmore Law School. It was founded in 2016 with the aim of furthering access to justice through the provision of legal information to all persons. This is done through research, advocacy and outreach activities. These activities revolve around the SLC's golden circle (why, how and what). 'Why' speaks to the belief that everyone is entitled to access justice without prejudice to gender, ethnic background or socio-economic status. 'How' is through providing legal information that is easy to understand and apply and, the 'what' speaks to the strategy the employs which is; conducting research and outreach programs. To facilitate this, the Clinic is divided into three units, namely, the Criminal Justice Unit, the Human Rights unit, and the Entrepreneurship unit. At the beginning of every year, students who have enrolled into the various units of the clinic commit towards coming up with projects tailored along the various themes of their units.[90]

The Clinic has a four-tier organizational structure. At the very top is the Faculty Oversight Board consisting of the Dean of the Strathmore Law School, two faculty directors and former members of the Steering Committee. Below the Oversight Board is the Steering Committee, which is constituted of a team of 5 experienced students and at the unit level, each Unit has a Unit Committee that together with the Steering Committee, serve as the managing body of the Clinic in its day-to-day activities. Lastly, we have the members who form the backbone of the Clinic and do the hands-on work that ensures that the vision and mission of the Clinic is achieved.[91]

The Activities of the SLC in Promoting Legal Aid and Access to Justice in Kenya

The SLC has taken part in a number of programs and activities in a bid to provide legal aid and enhance access to justice. This paper will focus on some of the activities carried out in 2019 and 2020.

In 2019, the Clinic partnered with *Crime si Poa* and developed the *Sheria Mashinani Program.* This was a community awareness project that sought to

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90 Strathmore Law Clinic, *Annual Report* (2019) - <https://slcentrepreneurship.wixsite.com/lawclinic/post/slc-annual-report-2019>, 6.

91 ibid.

entrench sustainable legal empowerment within Kibera. It was done in two stages. The first stage focused on training a group of youth leaders representing all the thirteen villages of Kibera on human rights, labour law and the Law of Business Associations. The second stage involved the trainees themselves conducting outreach sessions at Shining Hope for Communities (SHOFCO) Hall in Gatwekera, Kibera educating the members of their community.[92]

The Clinic also collaborated with the Leitner Clinic Centre (New York) to document girls' experiences in the juvenile detention system in Kenya. This culminated in an advocacy tool that was written to inform policy with regard to girls' detention in Kenya.[93] In line with detention, the Clinic also conducted training sessions at the Kiambu, Lang'ata and Thika Prisons partnering with African Prisons Project (APP) to train incarcerated persons on Criminal Procedure, Constitutional Law, and the Law of Evidence.[94] The Clinic supplemented its work on criminal justice by providing mentorship to juvenile offenders at the Kamiti Youth Correction and Training Centre.[95]

In campaigning against sexual and gender-based violence in Kenya, the Clinic conducted a sexual and gender-based violence workshop in Kibera geared towards informing and educating people in Kibera on the avenues they can use to seek redress.[96] In September 2019, the Clinic held a conference on 'end rape culture' in Kenya which was led by Hon. Justice Njoki Ndung'u. The conference aimed to start a conversation around and provide perspectives and solutions on reducing sexual violence in Kenya.[97]

Due to COVID-19, the Clinic faced challenges in achieving its set goals in 2020. Living in a technological age, however, the use of online platforms to disseminate legal information and carry out various research-based projects was adopted. Through webinars on juvenile justice, sexual and gender- based violence, intellectual property law, empowering small to microbusinesses and on enhancing access to justice in Kenya, the Clinic executed its mandate. In partnership with Queen Mary University, the Clinic also gave free legal advice and opinion letters to some start-ups in Kenya. The students who were part

92 ibid 11.
93 ibid 18.
94 ibid 19.
95 ibid 21.
96 ibid 17.
97 ibid 16.

of this project got to draft legal opinion letters under the supervision of their lecturers and a few advocates of the High Court of Kenya.

The Impact and Significance of Law Clinics in Kenya, A Case of Killing Two Birds with One Stone

Clinics not only have a positive impact on the society but also on the students enrolled. As mentioned, work done by the SLC has been able to sensitise and empower members of the society on the law and how it affects aspects of their lives. Institutions such as FOLLAP have also been key figures in creating legal awareness in Kenya. They have done this through legal aid clinics, special training programs given to various targets groups, such as women on gender rights, and the use radio stations and televisions based in Nakuru to discuss various aspects of the law and how they affect the community at large.[98] Clinics give students the opportunity to not only fill the gap while they are in school but to take up the mantle in giving legal aid once they graduate. Evidence also shows that participation in Clinic activities gives students a competitive edge when it comes to recruitment into various organisations.[99] The proper establishment, institutionalisation and funding of clinic programs by all law schools in Kenya will help impart various skills in students while at the same time promoting legal aid and access to justice in Kenya.

A Comparative Study of Law Clinics in USA and South Africa

In America, the American Bar Association which regulates legal education has set out provisions that encourage students to consider pro bono work. In its handbook, it provides that a law school shall provide substantial opportunities to students for participation in pro bono legal services, including law-related public service activities.[100]In the United States, a majority of the ABA-accredited law schools have incorporated pro bono or rather public service programs into the school's curriculum in order for the students to graduate. This requirement does not compel students to take up pro bono work but only urges law schools to avail the platform. The model capitalises on the students' ingenuity and resourcefulness to set up pro bono programs out of their own initiative. The Council of Legal Education (CLE) should

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98 https://follap.egerton.ac.ke/ accessed 20 November 2020.

99 Yohana Ouma and Esther Chege, 'Law Clinics and Access to justice in Kenya: Bridging the legal divide' (2016) 23 International Journal of Clinical Education 131.

100 American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020* (*ABA Publishing*, 2019) Standard 303(b).

similarly require law schools to avail such a platform to law schools and endorse the program, especially at the undergraduate level.

In South Africa, there is an established Legal Aid Board which is greatly concerned with pro bono work. This body uses justice centres (entities that operate similarly to private law firms but, are instead principally concerned with pro bono work) in conjunction with university law clinics. The Legal Aid Board enters into cooperation agreements with certain university law clinics to provide additional legal assistance to the local communities.[101] In a similar fashion law schools in Kenya should make efforts to partner with centres that provide pro bono services. Stakeholders such as the Legal Aid Service Board should ease and facilitate such initiatives by documenting and crediting universities that take up the initiative. The benefits are immense as the workload for entities running pro bono work is lessened due to the contribution of many hands and the quality of their work also improves.

Incentivising Students to Take Part in Clinical Programs

Despite the establishment of law clinics across various law schools in Kenya, students have still been reluctant in enrolling. This is because most students would rather pursue other less strenuous but more rewarding activities. To combat this, a credit system can be set up to incentivise students to sign up for the program. The Kenyan government through the CLE and various law schools, can establish a unitary credit system for law students in the undergraduate programs. This system will credit students who participate in law clinics or other programs that help in realizing the goal of access to justice.[102] This can be done by having a certain number of hours spent on a certain project. To make sure it is incentivised and not mandatory, this opportunity may be offered as a final- year elective.

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101 Latham & Watkins LLP, 'Pro Bono Practices and Opportunities in South Africa' (*Pro Bono Institute*, 4 September 2015) <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-south-africa.pdf > accessed 2 August 2020.

102 Strathmore University is currently working towards implementing a credit system for students who are active members of the Strathmore Law Clinic, where those who perform extraordinarily can earn credits in their final year of study. This has led to more students taking up more projects and playing more active roles within the Clinic.

Harvard Law School has provided a good blueprint. To meet the requirement to receive pro bono credits, the work must meet a strict criterion.[103] It must be supervised by a licensed attorney, performed by both the supervising attorney and the student on behalf of a duly described clientele**,** it must be legal and involve the application or interpretation of the law, the formulation of legal policy, the drafting of legislation or regulations or regulations and/or work done in anticipation of litigation and must also be uncompensated.

Finally, recognition of pro bono activities performed by students through awards makes a public statement about a law school's commitment to teaching the value of public service. This can take the form of trophies, certificates, and even financial awards.[104] These awards may be given at the time of graduation or annually at an awards ceremony or dinner. Some schools have introducing special award programs for outstanding faculty pro bono service. Examples of such universities include Albany Law School, Washington College of Law, Appalachian School of Law, Arizona State University, Sandra Day O' Connor College of Law, and Baylor University Law School, among others. Law schools in Kenya can adopt such a system.[105]

CONCLUSION

Despite the robust Constitutional provisions as to the responsibility of the state in promoting access to justice, to the indigent majority in underserved communities the right remains a myth and a distant reality.[106] The main aim of the paper has been to portray incentivised pro bono as a possible solution to the critical problem of access to justice. The implementation of pro bono programmes would create a community and culture of lawyers that are more involved in serving indigent and underprivileged persons. The piece has shown that law clinics have been used and effective both in Kenya and in other jurisdictions to further pursuit of access to justice and has also explored the creation of a sui generis system that uses tax relief as a means of

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[103] Harvard Law School, 'Handbook of Academic Policies'(Page 31, 2020-2021) < https://hls.harvard.edu/content/uploads/2020/09/2020-2021_HAP_Final.pdf> accessed on 10 April 2021.

[104] American Bar association, 'Awards and Recognition' (*ABA*, 10 October 2020) https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_awards/> accessed 19 November 2020.

[105] ibid.

[106] Patricia Kameri Mbote and Migai Akech, 'Kenya: Justice sector and the rule of law' (A review by Afrimap and The Open Society Initiative for Eastern Africa 2011) xii.

incentivisation and the integration of pro bono services with Continuous Development Points (CPDs).

Placing Access to Justice at the Centre of Legal Education in Kenya

Rodgers Otieno Odhiambo*

ABSTRACT

This paper examines the role of legal education providers in the context of enhancing access to justice in Kenya through clinical legal education initiatives. The paper explores the significance of placing access to justice at the center of legal education. Kenya is at a critical moment where numerous challenges in accessing justice have been documented. They are among others, poor legal awareness, insufficient legal services, corruption within the justice sectors, geographical barriers, financial barriers, institutional barriers, discriminatory norms, illiteracy, and stigma. These challenges threaten the legal profession's most fundamental legal ideals. When people lack effective representation to help with their most pressing problems, our legal system fuels alienation and inequality, and when the justice system fails those in poverty and facing inequality, violence can result. In this state of affairs, access to justice doesn't simply make a difference; it protects lives. Therefore, this paper contends that the legal education providers have a role in preparing the next generation of lawyers the values, skills and knowledge necessary for the delivery of the constitutional promise of access to justice. This calls for the legal education providers in Kenya to place the issue of access to justice at the center of legal education with an understanding that access to justice is fundamental to establishing and maintaining the rule of law as a constitutional principle and value. This would enable Kenyans and especially the vulnerable members of the society to have their voices heard even as they exercise their legal rights. Indeed, access to justice is an indispensable factor in promoting

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citizens' empowerment, in securing access to equal human dignity and in social and economic development.

There is need for legal education providers to develop strategies that would make access to justice more central in legal education. Further, it is argued that a framework that focuses on clinical legal education aligned with other people-oriented and critical skill sets are not only useful but also deemed necessary for enhancing access to justice in our country. Clinical legal education will not only provide these future lawyers with the skills necessary for becoming a better lawyer but also enact positive change in the society. Law schools must confront the legal system's limitations. The main conclusion reached is that by placing access to justice at the center of what they do, legal education providers can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under law.

Key Words: Access to justice, clinical legal education, Legal education providers, lawyers.

INTRODUCTION AND BACKGROUND

This paper examines the role of legal education providers in the context of enhancing access to justice in Kenya through clinical legal education initiatives. The paper explores the significance of placing access to justice at the center of legal education.

Access to justice is fundamental to the establishment and maintenance of the rule of law, because it enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment and securing access to equal human dignity. Moreover, a mutually supportive link exists between, on the one hand, improving, facilitating and expanding individual and collective access to law and justice, and, on the other hand, economic and social development.[1]

[1] J. Beqiraj and L. McNamara, International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014), International Bar

According to Chappe *et al*,[2] access to justice to all citizens can only be possible by giving legal advice and legal assistance to all people who cannot afford the services of a lawyer. Indeed, access to justice is one of the fundamental rights that the citizens of a country are entitled to enjoy in the exercise of their liberty, equality, and dignity[3]. It is because of this nature that bills of rights have unanimously recognized not only as right in itself alone but also as an instrumental right safeguarding the protection of other rights[4]. This is the nature of the right, however, the conceptual underpinning of the rights and the extent of the enjoyment of the right are far from uniform acceptance by all jurisdictions[5]. Particularly, problems relating to the enforcement of this right have been the most worrying subject for jurists, human rights activists and everybody that are concerned about the dignity of human-beings on equal footing and without distinction on the basis of race, color, financial capacity and the like[6].

This paper seeks to make a humble input to the ways that legal education providers can use clinical legal education to realize access to justice in Kenya, particularly by the marginalized, poor and vulnerable members of our society. The clinical legal education may be seen as a fairly new element within the Kenyan legal system, commonly referred to as legal aid. This paper contends that with appropriate support and attention, clinical legal education can have great and meaningful impact on the realization of access to justice by the aforementioned members of society. Indeed, the fundamental purpose of this paper is to highlight the significance of clinical legal education in realizing access to justice particularly by the poor, marginalized and vulnerable members of the Kenyan society.

Kenya is at a critical moment where numerous challenges in accessing justice have been documented. They are among others, poor legal awareness, insufficient legal services, corruption within the justice sectors, geographical barriers, financial barriers, institutional barriers, discriminatory norms,

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Association, 2014. Available at websites of the IBA Access to Justice and Legal Aid Committee **www.ibanet.org.** p.8. Accessed on 13 November 2020.

2 Nathalie Chappe *et al* (2012) Access to Justice and Legal Aid (University of Franche-Conte)

3 Gurmesse F. Anbesie (2018), The Role of University-Based Legal Aid Centers in ensuring Access to justice in Ethiopia. http: //creativecommons.or/licenses/4.0/ accessed on 30th May 2021.

4 ibid at 3.

5 ibid.

6 ibid.

illiteracy, and stigma. These challenges threaten the legal profession's most fundamental legal ideals. When people lack effective representation to help with their most pressing problems, our legal system fuels alienation and inequality, and when the justice system fails those in poverty and facing inequality, violence can result. In this state of affairs, access to justice doesn't simply make a difference; it protects lives.

This paper is divided into four parts. The first part gives an overview of the concept of access to justice and its international recognition as a human right. The second part deals with access to justice in Kenya, particularly in the context of legal and structural challenges. The third part looks at enhancing access to justice through clinical legal education initiatives and the significance of clinical legal education as well as recommendation on the structure, programmes and curriculum of the University Law Clinic in Kenya. In the fourth part, the paper makes some concluding remarks.

Access to Justice as a Concept:

An Overview

Access to justice, according to Cappelletti and Grath[7], encompasses first, a system that is equally accessible to all, and leads to results that are individually and socially just. Justice Majanja in the case of *Dry Associates Limited v Capital Markets Authority & Another,*[8] at paragraph 110 stated that access to justice is a broad concept that defies easy definition. According to the judge, access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law, access to information, equality in the protection of right; access to justice systems particularly the formal adjudicatory processes; availability of physical legal structures; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay. Indeed, in the Kenyan's context, the right of access to justice is to be found at **Article 48** of the Constitution of Kenya which provides thus:

> ***48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice[9].***

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7 Cappelletti and Grath (1978), Access to justice: The newest wave in the worldwide movement to make rights effective. P. 6.

8 [2012] eKLR.

9 Constitution of Kenya, 2010 Article 48.

According to United Nations Development Programme (UNDP),[10] access to justice is more than improving an individual's access to courts or guaranteeing legal representation. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.[11]For UNDP, there is no access to justice where citizens, especially marginalized groups, fear the system, and see it as alien; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Further, it is the position of UNDP that, access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.[12]

The right to have access to justice is a basic and inviolable right as guaranteed under international human rights instruments and national constitution as will be shown in this paper. Moreover, marginalized social groups are universally identified as beneficiaries of this fundamental right; these socio-economically disadvantaged groups include the "rural poor, women and children, people with diseases and disabilities, ethnic minorities, among others[13]."

Furthermore, access to justice involves equality in accessing legal services by all persons regardless of means, and access to effective dispute resolution mechanisms necessary to protect their rights and interests. It further, calls for national equity in that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy. In addition, it requires equality before the law, by ensuring that all persons, regardless of race, ethnic origin, gender and disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[14] Therefore, in the absence of access to

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10 United Nations Development Programme, "Access to Justice Practice Note" 2004.

11 United Nations Development Programme, Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice, Bangkok, UNDP, 2005.

12 UNDP, Strengthening Judicial Integrity through enhanced access to justice, http://europeand cis.undp.org, (2013) accessed on 30th May 2021.

13 UNDP, Programming for Justice: Access for All, 2005, p.3.

14 L. Schetzer *et al*., "Access to justice& Legal Needs; a project to identify Legal Needs, Pathways and barriers for advantaged People in NSW," Available at; http://www.lawfoundation.net.au/ljf/site/articleids/6ffeb98d3c8d21f1ca25707e0024d3eb/$file/older_law_report.pdf accessed on 13 November 2020.

justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable.[15]

Kokebe W. Jemaneh[16], makes a very powerful link between the rule of law and access to justice. In his chapter *Reconsidering Access to justice in Ethipia: Towards A Human Rights-Based Approach,* he asserts that it has been long since the idea that rule of law is central to a properly functioning state is widely accepted. Bedner A. & Jaquelin A.C.Vel opine that, although there are differences in understanding of the concept of rule of law, it is now widely accepted that the notion of rule of law requires that government officials and citizens be bound by and act in accordance with written, publicly disclosed laws which are consistent with universally accepted human rights norms and standards and which should be enforced in accordance with established procedures.[17]

The rule of law is a fundamental protection to people guaranteeing that the society's laws will be respected and upheld. It is a guarantee that, if adhered to strictly, will enable society to live in the most fulfilling social order. It underpins economic and social cooperation and is fundamental to ensuring economic development, political stability and social justice.[18] According to Domingo, the rule of law means less corruption, protected and enforceable legal rights, due process, good governance, transparent and accountable government.[19]

At the core of the rule of law principle is to be found access to justice, for otherwise rule of law will lose its validity and significance if citizens are unable to access justice services to address grievance and limit governmental

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15 ibid.

16 Toggia Pieto S. *Et al*, "Access to justice in Ethiopia: Towards an Inventory of Issues", Centre for Human Rights Addis Ababa University, (2014).

17 Bedner A. & Jaquelin A.C.Vel, 'An Analytical Framework for Empirical Research on Access to Justice', Law, Social Development & Global Development Journal (LGD) e-journal, 2010(1), p. 20; available at: http://www.go.warwick.ac.uk/elj/lgd/20010_1/bedner_vel. Accessed on 30th May 2021.

18 The link between rule of law and economic prosperity is clear from the World Economic Forum's Global Competitiveness Index which uses elements of rule of law as part of the requirements for global economic competitiveness. World Economic Forum, Global Competitiveness Report 2008-2009 , World Economic Forum, Geneva, 2008, p. 4.

19 Domingo, P., Why the Rule of Law Matters for Development?, Overseas Development Institute (ODI), London, 2009, p.131.

authority.[20] According to Kokebe, it is not enough to formally state that government officials and citizens must act in accordance with established rules; there must be a mechanism to seek justice and redress where rights are not protected and promoted or have been violated. This highlights the central place that access to justice assumes in the modern state. It is perhaps the most inspiring ideal of any society and one of the reasons for which entire legal systems exist.[21]

Despite its prominent importance in the modern democratic state, there is no uniform understanding of the term 'access to justice.' Like other companion concepts in the study of law and justice, it is a term that is used without precise and clear definition. Although some of its elements are clearly protected, it is not a term that is often expressly used or defined by international human rights conventions.[22] However, an evaluation of literature and policy papers on the issue of access to justice reveals that there are two approaches to the meaning of the term.

The first sense in which the term access to justice is used equates it with access to judicial remedies to vindicate rights recognized by law and/or resolve disputes. In many instances it is used to refer to particular procedural elements of access to justice such as access to courts, the right to fair hearing, access to legal services, adequate redress, and timely resolution of disputes. This is the narrower understanding of the concept of access to justice. Programming designed to enhance access to justice according to this conception focuses on developing means of overcoming the obstacles faced by individuals in making use of the formal justice process established to provide redress. In the past these have included legal advice and representation, the adoption of special procedures (such as class action and public interest litigation) to represent diffuse group and public interest, the simplification of procedures, and the promotion of alternatives to the formal judicial process to settle disputes.[23]

However, according to Kobebe, reformers and commentators on access to justice have, however, noted the apparent inadequacies of this conception of

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20 Davis W. & Turku, H., 'Access to Justice and Alternative Disputes Resolution', Journal of Dispute Resolution, Vol.47, no. 1, 2011, P. 49.

21 Supra (n.16).

22 ibid.

23 Cappelletti, M.& Garth, B., 'Access to Justice: The Newest Wave in the WorldWide Movement to Make Rights Effective', Buffalo Law Review, Vol. 27, 1977-1978, pp. 181- 292.

access to justice. They called for a broader and comprehensive conception of access to justice which goes beyond formal aspects of access to legal services and justice dispensing institutions and reflect better all aspects of the justice process that guarantees not merely formal justice (equality in accessing the justice system) but substantive justice. While for a long-time access to justice has been understood as access to courts and the availability of legal service, this approach is changing. This is premised on the idea that expanding access to the court will not necessarily help the poor and vulnerable if the law does not address their concerns.[24] Indeed, as has been noted in this paper, and especially in the context of UNDP, it has been established that courts are not necessarily the only suppliers of justice, and thus access to justice has increasingly been defined in a boarder manner than the essentially access to court approach, with the focus being more on ensuring that dispute resolution outcomes are just and equitable.[25]

This broader conception of access to justice is concerned with the substantive aspect of justice: the use of the legal system as a tool to achieve overall social justice, and is a result of a growing international movement to re-conceptualize access to justice in a comprehensive manner based on human rights standards. It is an integral part of a human rights-based approach to development theory that is normatively based on international human rights standards and operationally directed at ensuring social justice.[26]

Access to Justice: Its Significance

This paper underscores the significance of access to justice due to its remarkable link with the rule of law. It is an essential element of the rule of law and democracy. The institutions of justice, afford people the protection of their rights against infringement by other people or bodies in society, and allow parties to bring actions against government thus limiting the power of the executive and hence guarantee governmental accountability. If people are unable to access these institutions to protect their rights, respect for the rule of law is diminished.[27]

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[24] Sinnar, S., 'Access to Justice-Topic Brief' (World Bank), available at www.worldbank.org accessed on 8 November 2020.

[25] Supra (n 13).

[26] Supra (n 16).

[27] Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009.

Further, upholding of the rule of law is fundamental to economic and social development of a country, and its prosperity. It enables people to plan and live their life as they choose and underpins social and economic development. According to UNDP, barriers to justice also reinforce poverty and exclusion.[28]

The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.[29] When there is no proper protection afforded to access to justice, the rule of law will dealt a blow and greatly compromised, giving rise to negative impact on security and development.

The concept of access to justice plays a significant role to security and development of a country in multiple ways: Firstly, the enforcement of a body of rules and rights which govern the relationship between the state and individuals, and among individuals, depends on citizens' access to and confidence in the justice system[30]. In order to create a stable social, political and economic environment a state must be able to provide dispute resolution mechanisms to all citizens.[31] A strong justice system is necessary for the promotion and protection of social justice.[32] If a properly functioning and responsive justice system is lacking, individuals will take the law into their own hands, thereby resulting in the loss of legitimacy of the state[33] and the breakdown of law and order. Access to justice can also help to hold governments accountable and transparent thereby preventing them from degenerating into tyrannical regimes.[34] Thus, access to justice helps to consolidate peace and support reconciliation by creating the necessary conditions that allow people to resolve legitimate grievances which might otherwise lead even to broader social conflicts[35].

Secondly, improving, facilitating, and expanding individual and collective access to justice supports economic and social development.[36] According to the World Development Report, "legal institutions play a key role in the

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28 United Nations Development Programme's Commission on Legal Empowerment of the Poor, "Making the law work for everyone" (2008) 1, 33.
29 Supra (n 27).
30 Supra (n 16).
31 Davis W. & Turku, H., 'Access to Justice and Alternative Disputes Resolution', Journal of Dispute Resolution, Vol.47, no. 1, 2011, P. 49.
32 ibid (n 16).
33 ibid.
34 ibid.
35 ibid.
36 ibid.

distribution of power and rights, and that they also underpin the forms and function of other institutions that deliver public service and regulate market forces.[37]" According to UNDP, it is increasingly recognized that lack of effective access to justice is a major impediment to eradicate poverty.[38] Further, the link between poverty and the absence of legal protection for the poor has also been recognized by the International Commission on Legal Empowerment of the Poor.[39]

In his book, Development as Freedom, Amartya Sen opines that development is increasingly understood not as increase in per capita income, but "…as a process of expanding the real freedoms that people enjoy."[40] Thus development or eradication of poverty is about enhancing the capability of disadvantaged section of the society.[41] Certain sections of the society are considered as disadvantaged because their inability to access justice remedies in existing systems increases their vulnerability to poverty, and in turn their poverty hinders them from accessing justice systems to assert their rights.[42]

A justice system that is accessible for the disadvantaged segment of society helps them to enforce their rights which will further enhance their ability to have control over factors that affect their life such as security, livelihood, access to essential resources, and participation in public decision-making process.[43] This is particularly important in the context of power inequalities. An effective system for access to justice that responds to the needs of the poor, can hold governments and private actors accountable, and can address power imbalances that permit the elite to capture resources and the disempowerment of the poor.[44]

Access to Justice in Kenya: Legal and Structural Challenges

37 World Bank, World Development Report 2006: Equity and Development, New York: Oxford University Press, 2005, p. 156.
38 Ibid Note No. 13
39 Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, UNDP, New York, 2008, Vol. 1, p. 33.
40 Sen, A., Development as Freedom, Alfred A. Knopf, New York, 1999, p.3.
41 Supra (n 16).
42 Supra (n 13) p. 4.
43 Supra (n 13).
44 Supra (n 39) Pp 31 – 32.

Introduction

The normative framework for access to justice is found in international instruments, setting principles and minimum rules for the administration of justice. They comprise the Universal Declaration of Human Rights, the international human rights law and specific conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations.[45]

In Kenya, adoption of the 2010 Constitution has brought hope on the issue of access to justice being that the same is now a fundamental right guaranteed therein. Article 48 of the Constitution obligates the state to ensure access to justice for all persons. The said article is geared towards enhancing access to justice for all persons in Kenya especially the poor.

Whereas article 48 of the Constitution of Kenya 2010 has made access to justice a fundamental right, there are other provisions that are geared toward enhancing equal access to judicial and other administrative institutions and mechanism in the same Constitution.

Under Article 22 of the Constitution, the Chief Justice is required to make rules to provide for the right of every person to access courts and seek the enforcement of rights and fundamental freedom in the Bill of Rights that has been denied, violated, infringed or threatened.[46]

Article 22 (3) is intended to ensure that no impediment whatsoever shall stand on the way to access to justice by ensuring that no fees are charged for commencing proceedings, removing the strict legal provisions of *locus standi,* minimizing procedural formalities, entertaining the commencement of proceedings on the basis of informal documents and allowing experts to appear as friends of the court.

The Constitution, under article 35, acknowledges the right of access to information held by the state and information held by another person and required for the exercise or protection of any right and fundamental freedom.[47]

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45 M. Anderson, "Access to justice and Justice and legal process; Making Legal Institution Responsive to the poor" (2003) LCD WORKING PAPER 178.

46 Article 22 of the Constitution of Kenya, 2010.

47 Article 35 of the Constitution of Kenya, 2010.

Under article 47, there is provision for fair administrative action and thus provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It further calls for written reason where a Right or a fundamental freedom of a person has been or is likely to be adversely affected by an administrative action.[48]

Article 48 enjoins the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.[49]

Article 50 makes the provision for fair hearing, and further provides for the right of every person to have an advocate assigned by the state and at the state expenses, if substantial justice would otherwise result and to be informed of this right promptly. This article thus provides for easy access to justice for capital offenders to be represented especially in circumstances where they are not able to afford an advocate.[50]

Under article 159, the principles that should guide the courts and tribunals are outlined. They are called upon to be guided by the fact that justice shall be done to all irrespective of status, justice shall not be delayed, alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promote, judicial justice be administered without undue regard to procedural technicalities and the purpose of the constitution be promote/d and protected.[51]

Kenya has also key statutes touching on access to justice. Section 1 A (1) of the Civil Procedure Act provides that the overriding object of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.[52] The Act enjoins the Court to exercise its powers and interpretation of the Civil Procedure to give effect to the overriding object.[53]

The Legal Aid Act No. 6 of 2016, establishes a legal and institutional framework to promote access to justice.[54] The Act seeks to promote access

48 Article 47 of the Constitution of Kenya, 2010.
49 Article 48 of the Constitution of Kenya, 2010.
50 Article 50 of the Constitution of Kenya, 2010.
51 Article 159 of the Constitution of Kenya, 2010.
52 The Civil Procedure Act, Chapter 21.
53 Section 1A of the Civil Procedure Act, Chapter 21.
54 Section 3 (The Object of the Act) of the Legal Aid Act, No. 6 of 2016.

to justice in Kenya by: (a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution; (b) providing a legal aid scheme to assist indigent persons to access legal aid; (c) promoting legal awareness; (d) supporting community legal services by funding justice advisory centers, education, and research; and (e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

Section 4 of the Act, provides for the guiding principles thus: (a) the national values and principles of governance set out in Article 10 of the Constitution; (b) the values and principles of the public service set out in Article 232 of the Constitution; (c) the principles of impartiality, gender equality and gender equity; (d) the principles of inclusiveness, non-discrimination and (e) protection of marginalized groups; (f) the rules of natural justice; and (g) the provisions of any treaty or convention ratified by Kenya, relating to the provision of legal aid.[55]

The Act, by dint of section 5 establishes the National Legal Aid Service which is a body corporate and whose functions include to: (a) establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; (b) advise the Cabinet Secretary on matters relating to legal aid in Kenya; (c) encourage and facilitate the settlement of disputes through alternative dispute resolution; (d) undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; (e) take necessary steps to promote public interest litigation with regard to consumer protection, environmental protection and any other matter of special concern to the marginalized groups; (f) provide grants in aid for specific schemes to various voluntary social service institutions, for the implementation of legal aid services under this Act; (g) develop and issue guidelines and standards for the establishment of legal aid schemes by Non-Governmental Agencies; (h) in consultation with the Council of Legal Education, develop programs for legal aid education and the training and certification of paralegals; (i) promote, and supervise the establishment and working of legal aid services in universities, colleges and other institutions; (j) promote the use of alternative dispute resolution methods; (k) take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws; (l) facilitate

[55] Section 4 (Guiding Principles) of the Legal Aid Act No. 6 of 2016

the representation of persons granted legal aid under this Act; (m) assign legal aid providers to persons granted legal aid under this Act; (n) establish, coordinate, monitor and evaluate justice advisory centers; (o) coordinate, monitor and evaluate paralegals and other legal service providers and give general directions for the proper implementation of legal aid programs; (p) administer and manage the Legal Aid Fund; and (q) perform such other functions as may be assigned to it under this Act or any other written law.[56]

In addition to the direct constitutional guarantee of access to justice, Kenya has incorporated the access to justice requirements of various international instruments into its domestic law through Article 2(5) and (6) which recognize international law as part of Kenya's law.[57]

Key among the international instruments include, the International Convention on Civil and Political Rights (ICCPR); Universal declaration of Human Rights (UDHR); Convention on the Elimination of All forms of Discrimination Against Women (CEDAW); African Charter on Human and People's Right.

The International Convention on Civil and Political Rights (ICCPR) guarantees the right of access to the courts and provides that, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Moreover, the Convention, guarantees that all persons shall be equal before the courts and tribunal.[58]

Additionally, Article 14 of the ICCPR expressly guarantees that all persons shall be equal before the courts and tribunal. The provision may have been intended only to secure equal treatment when a person appears before a court. However, the treatment can hardly be considered equal if an entire segment of the citizenry is effectively denied access to the means to secure and protect their rights.

On its part, and just like ICCPR above, the Universal Declaration of Human Rights (UDHR) recognizes access to justice and access to the courts as a human right themselves. It provides, under article 10,[59] that each individual has the right in full equality to a fair and public hearing by an independent and

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56 Section 7 of the Legal Aid Act, No. 6 of 2016
57 Article 2 (5) & (6) of the Constitution, 2010
58 Article 14 of the ICCPR.
59 Article 10 of the Universal Declaration of Human Rights.

impartial tribunal, in the determination of their rights and obligations. The Declaration provides the right of individuals to an effective remedy as determined by the courts for violation of the fundamental rights granted by him by the Constitution or by the Law as per article 8 of the Declaration.[60]

According to the Convention on Elimination of All forms of Discrimination, state parties shall ensure everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violates his human rights and fundamental freedom as well as the right to seek from such tribunal just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.[61] This therefore means that the Convention obliges state parties to protect its citizens" right against racial discrimination which includes an obligation to provide individuals with a mean of seeking redress in a national court or tribunal for a violation of that right.

With regard to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the States have the obligation to ensure equality between men and women both theoretically and practically, through law or other material means.[62] The Convention provides for a right to access to justice but further measures must be taken by the state to ensure that these rights exist not only in theory but also effectively in practice. Further, the Convention acknowledges that one of the main barriers to access to justice is the poor knowledge of the law, especially among rural women. Therefore, the Convention enjoins the state to widely diffuse the law, for example through periodic awareness-raising campaign, in the language of the state concerned.

Finally, the African Charter on Human and Peoples' Rights under article 7 makes a provision requiring every individual to have a right to be heard which includes the right to an appeal to competent national organs against acts of violating his fundaments rights as recognized and guaranteed by conventions, laws, regulations and customs in force.[63] The Charter further provides under article 3 which provides that every individual shall be entitled to equal protection of the law.

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60 Article 8 of the Universal Declaration of Human Rights.
61 Article 6 of the Convention on Elimination of All forms of Discrimination.
62 Article 2 of the Convention on the Elimination of All forms of Discrimination against Women.
63 African Charter on Human and Peoples' Rights (ACHPR).

Indeed, the African Commission on Human and peoples' Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa in the year 2001. The Principles and Guidelines expressly recognized the necessity of access to the courts to redress human rights violations by stating that States must ensure, through adoption of national legislation that in regard to human right violation, which are matters of public concern, any individual, group of individual non-governmental organization is entitled to bring an issue before judicial bodies for determination.[64]

Challenges to Access to Justice

According to Sida,[65] the reasons why people living in poverty incur challenges when accessing justice vary from one community to another and context to the other, but many typically relate to under development of the legal framework and discriminatory norms, poor legal awareness, insufficient legal services, problems relating to legal capacity and corruption within existing justice sectors or generally inability of the justice system to reach beyond the interest sphere of the more affluent and influential members of the society.

Societal and Cultural Barriers

According to Beqiraj and McNamara, access to justice is affected by the social and characteristics of jurisdiction, including economic factors. Characteristics may include average income, inequality gaps, economic structure, urbanization, religion and level of literacy and education.[66] In the following paragraphs this paper briefly discusses some of the ways in which social barriers may be a hindrance to access to justice. They include the following:

Poverty

According to the authors,[67] poverty is both a cause and a consequence of inadequate levels of access to justice. On the one hand, reduced financial

64 In 2001, the African Commission on Human and peoples' Rights adopted a set of Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa.

65 Sida, "Equal Access to Justice, A Mapping of Experiences" (2011) www.sida.se accessed on 30th of May 2021.

66 J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014),* International Bar Association, October, 2014.

67 ibid (n 66).

and human resource allocations to justice institutions produce failures in the justice system. They assert that failures in turn have a disproportionate impact on the poor, precisely because of their lack of individual economic resources enabling them to overcome systemic failures.[68] Further, the authors are of the view that when equal access to justice is denied, people living in poverty are less able to enforce their economic and social rights, including property and labour rights, and to avoid exploitation[69]. Moreover, poverty as a barrier to access to justice is exacerbated by other structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information, limited political say, stigmatization and discrimination.[70] The authors opine that poverty may affect large portions of populations, but some groups will be disproportionately represented among the poor. Socially marginalized and otherwise disadvantaged people will be more seriously affected than the general population. Ensuring access to justice for these groups is a key focus of poverty eradication and empowerment.[71] The authors see combating access to justice failures that affect the poor is crucial because poverty is deeply embedded in some countries.[72]

Stigma

Due to deeply entrenched discriminatory stereotype that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest and undeserving,[73] the society including criminal police officers, court staff and other justice sectional personnel, reflect a discriminatory attitude of the wider society, often show discrimination or bias against persons living on poverty in their decision or behavior.[74] As a consequence, persons living in poverty are not treated fairly, efficiently and efficiently through the justice chain or informal adjudication mechanism.[75] Stigmatization and prejudicial attitude generate a sense of shame,[76] and discouraging to persons living in poverty from approaching public officials and seeking the support that they need, not wishing to expose themselves to even

68 ibid.
69 ibid.
70 ibid.
71 ibid.
72 ibid.
73 ibid.
74 Magdalena Carmona Magdalena Carmona *et al* "Access to justice for persons living in poverty, a human right approach"
75 ibid.
76 Office of the High Commissioner for Human Right in Nepal, (2011) P.63

greater social discrimination or abuse by the authorities, they may refrain from claiming entitlements or challenging abuses.[77]

Illiteracy

Literacy and education empower individuals, increasing their capacity to understand and insist on the enforcement of their right. Low level of literacy and education reduce access to economic resources and the capacity to understand and enforce rights, resulting to low level s of access to justice.[78] For one to comprehend the existence of rights and the ways in which such rights can be invoked and enforced by judicial and adjudicatory mechanisms, is fundamental to the appreciation of the phenomenon of access to justice.

Persons living in poverty are mostly illiterate and thus have very little or no understanding of the law and its applicability in their circumstances. They are unaware of the existence of their legal rights and the entitlement of the state's obligation and duty towards them and how to secure the assistance they need. In most circumstances they have no idea where the laws can be found and even where the laws are availed to them, they can hardly read nor comprehend its content.[79]

The research suggest that some of the ways that could contribute in addressing social barriers include advocacy for changing legislations, Awareness arising of legal rights and judicial information through campaigns and programs, employing digital technology to disseminate general information and to provide informal legal education.[80]

Geographical Barriers

While excessive police deployment is problematic in some communities living in poverty, the absence of police and other institutions necessary for the administration of justice in rural, poor and marginalized areas is a common problem.[81] Courts, especially appeal courts are often located only in the Capital cities while police officer and lawyers are also concentrated in urban areas along with registries for lands, birth, death and marriages. In the circumstance, persons living in poverty often have to travel long distances at

77 ibid.
78 M Anderson, "Access to justice and legal process; Making Legal institutions Responsive to poor people in LCD"S WORKING PAPER" (2003) p.178.
79 ibid.
80 ibid.
81 Supra (n 78).

great costs to engage with the justice system, exposing them to unfamiliar environment and unsafe conditions.[82] Such factors often act as a persuasive deterrent against seeking redress from judicial and adjudicatory mechanisms, or may indeed represent an insurmountable obstacle for the poorest and most marginalized.[83] Those who experience limited mobility such as older persons or persons with disabilities are affected. For the poor people, the need to travel long distance to reach police stations, court houses or public registries often implies that they are in practice unable to seek redress or protection from violence, abuse and exploitation, and have greater difficulty in accessing documents such as birth certificates and title deed that are essential as evidence of their rights when they are contested, in land or inheritance proceedings.[84] Such distance may also affect the efficacy of the justice system and imply delays and needless lengthy detention periods. The poor are also disproportionately impacted when courts and police stations are not designed to ensure accessibility for those with physical impediments, and when court processes are not adaptable to the needs of persons with disabilities.[85]

Financial Barriers

Persons living in poverty face daunting financial hurdles to engage with the justice system on a fair and equal basis, not only the costs of legal assistance but also the direct and indirect costs.

Lack of Quality Legal Assistance

Legal aid is particularly important for persons living in poverty who are accused or victims of crime, as they face a range of obstacles such as negotiating for bail procedures, pre-trial detention, trial and sentencing and appeals.[86] In civil matters when a person does not have sufficient resources to pay for legal assistance she is prevented from asserting her rights.[87] Lack of legal aid for Civil matters can seriously prejudice the rights and interests of persons living in poverty as they are unable to contest tenancy disputes,

82 A Report by the Danish Institute for Human Rights based on a cooperation with the East Africa Law Society," Access to Justice and Legal Aid in East Africa" (2011).
83 ibid.
84 ibid.
85 ibid.
86 Asian Center for Human Rights, (2012) p.2.
87 Centre for poverty solutions, "making law work for everyone-volume 1"(2008) Ney York.

eviction decisions, immigration or asylum decisions and many more.[88] The legal process which relate to such civil matters are often extremely complex and there requirement onerous making it impossible for poor persons to represent themselves.[89]

Fees and Costs

In addition to legal fees, there are other numerous costs associated with accessing the justice system, which constitute a major barrier for those who simply cannot afford them. Costs are encountered at every stage of the legal process, alongside several direct costs, such as obtaining a legal document, commissioning of documents, photo copy and phone calls whose cumulative impact is a crucial factor in preventing the poor from accessing and benefiting from the justice system.[90] In criminal matters, costs are particularly burdensome where large sums of money is needed to pay bail or risk long periods of pre-trial detention. In addition to formal administrative fee, persons living in poverty encounter other collateral costs in accessing justice. The costs are severe for those living in the rural areas and who may have to travel days to access the justice system.[91] Persons who are employed in the informal sector may not be able to get permission from work thus they risk losing their work. Care givers, the majority being women may not be able to leave home to submit a claim or attend court hearings.[92]

Institutional Barriers

Several systematic problems in the operation of the justice system impact harshly on people living in poverty thus obstructing them at every stage of the justice chain.

Inadequate Capacity and Resources

Shortfalls in financial and human resource allocations to courts, police and prosecution corps, and insufficient training and capacity building for judicial and law enforcement officers, translate into failure in the judicial system that infringe upon access to justice.[93] Such failures including delays, flawed into insufficient evidence gathering, lack of enforcement, and abuse, undermine

88 Supra (n 87).
89 ibid.
90 ibid.
91 ibid.
92 International commission of Jurist, 2012 p.67.
93 Open Society Foundation "Open Society Justice Initiative, The Socio-Economic Impact of pre-trial detention," (2011).

the effective functioning of judicial and adjudicatory mechanisms and undermine human rights. Poor functioning of the justice system particularly affect the poor, because perusing justice requires a much greater effort and investment in terms of money and time for them, while their chances of a just and favorable outcome are worse.[94] When judicial systems receive inadequate financial and human resource allocation from state budget, police stations, prosecutors and courts are understaffed and poorly equipped, and benches are deprived of adequate number of judges.

The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the most disadvantaged, whose cases are usually under prioritized. None registration of complaints by the police is a practice common in overburdened and under resourced criminal systems.[95] In such cases, it is usually the complains of persons living in poverty that go unregistered due to bias, discrimination, and their disempowerment and lack of knowledge and information about their rights.[96] Rights and interest of women are thus especially compromised by badly resourced and trained judicial systems, police officers, state organs that traditionally reflect and prioritize the interest of men and are dominated by men.[97] Not only do women living in poverty come up against stark power imbalances, discriminatory cultural norms and other social structures when instituting legal proceedings, they are also disadvantaged by the lack of training afforded to officials on the application of the laws related to gender based violence and the improper treatment of victims and handling of complains.[98]

Excessive Delay

Due to lack of adequate resources and qualified staff, limited budget and inadequate infrastructure, there are unnecessary delays in adjudication of cases and enforcement of judgments.[99] While these problems affect all persons seeking justice through the formal justice system, they have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation. Often their cases are under prioritized due to biased preferential treatment to the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimant. Those with power and resources are not only able to

94 ibid.
95 ibid at 60.
96 ibid.
97 ibid.
98 ibid.
99 United Nations office on drugs and crime, 2011 p.23.

assume the costs of the long waiting period, but also have access to informal ways to speed up a process.

Corruption

In Kenya partly due to overstretched and unfunded judicial system, corruption is epidemic within the police force, prosecution lawyers, and among judicial officials. Illicit payments and favors enable those with financial and social capital to access the justice system with greater efficiency and effectiveness, and even to secure a certain outcome. When people living in poverty cannot afford to pay requested bribes for services that should be free, their claims and cases are delayed, denied or discontinued.[100] Moreover, bribes represent a greater burden for persons living in poverty, often meaning that they have to sell or sacrifice their health or education costs to meet such demands.[101]

Persons living in poverty are not only denied access to justice when they are unable to meet the costs of bribe or engage in other corrupt activities, but they are also deterred from accessing the justice system when they perceive the system to be corrupt. Such perception can have the seriously detrimental consequence of deterring people living in poverty from even attempting to access the justice system to have their rights enforced and to claim remedies from violations.

Procedural Barriers

High cost, complexities, excessive documentation requirements, geographically distinct offices and time-consuming processes of registration are great disincentives to accessing access to justice for the poor and the most marginalized.[102]

Formalism

[100] People living in poverty are more likely than other individuals to be confronted with requests for bribes, and to resort to paying bribes. In Burundi, a "certificate d"indigence" is to ensure that people living in poverty benefit from free legal advice and legal fee waivers" Transparency international, 2007, p.13.

[101] 147Evidence show that women are more likely to be affected by demands for bribes and in many cases, they are always subjected to harassment or abuse by law enforcement officers themselves., UN Women, 2011 p. 54.

[102] Sen, A. "Poor, Relatively Speaking," Oxford Economic Paper, PP35, Oxford University press.

Without the resources to retain private legal assistance, and with restricted access to legal aid, persons living in poverty are often forced to navigate the judicial system alone.[103] In doing so, they encounter a complex labyrinth of laws, traditions and interaction with copious paperwork, the use of legal jargon, mainstream languages and restrictive time limits, all of which can deter the poor from seeking justice under formal system and impede fair outcomes.[104] These barriers are particularly damaging in areas of the law that frequent impact upon the most marginalized. Person living in poverty may be unfamiliar with, and often intimidated by, regulations regarding dress codes, the hierarchy of the court system, confrontational design of court rooms, and traditions about when to sit, stand and address the judge. As a result they are in an unequal and disadvantaged position before they even walk into the courtroom. Requirements of high evidentiary proof before civil claims can be instituted can have a disproportionate impact on the poor who are hampered by their lack of financial resources, time, and understanding of the law and the legal process.[105] Collecting evidence, obtaining expert opinion and preparing forms in the correct language can be an impossible without the assistance of a competent legal representative. Persons living in poverty are even further disadvantaged when they are conducting proceedings or making claim against corporate entities. This is particularly evident in criminal cases, where the state controls the collation and production of evidence.[106] The process of collecting exculpatory evidence or obtaining expert testimony may prove prohibitively costly for the poor thus giving them very little hope at the trial.

Complexity of Procedure

While many people find it difficult to understand legal or judicial terminology, the complexities increase in multilingual and multiethnic societies like Kenya where legal proceed are conducted in English making it difficult for the very poor who only speak their local dialect. Similarly, judicial systems like ours that are heavily reliant on paper forms and written submissions put illiterate persons in a disadvantaged position. While individuals facing a criminal charge have the right to a free interpreter under international human rights law[107] in practice this service is often limited, unavailable or reserved for those who speak foreign language, rather than a minority language or local dialect,

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103 ibid at 60.
104 ibid at 74.
105 ibid.
106 ibid.
107 Article 14.3 (f) of ICCPR.

and is rarely provided for in civil cases. Even when the predominant language is spoken, cultural differences can impede communication within the judicial system. In some cultural groups, different terminology maybe used for specific occasions or to speak to people in a different terminology may be described in different ways.[108] Furthermore inter cultural communication between indigenous people and the judicial officers can be impeded by difference in perception of politeness, cultural taboos which prevent the giving of certain evidence.[109]

Enhancing Access to Justice Through Clinical Legal Education Initiatives

Clinical legal education is the defining term for a form of legal education which exposes students to the practical application of law and puts them in the position of using their legal knowledge to respond to real life issues.[110]

Indeed, this paper's focus is on clinical legal education on those public-facing initiatives through which students provide legal advice to members of the public on their legal problems, under the supervision of academics and/or legal practitioners. The development of this type of legal education is designed to meet multiple goals. First, to provide education, through high quality teaching and research; second, to deliver social justice by being responsive to justice problems highlighted in the foregoing sections of this paper; third, to add value to the student experience by developing professionally relevant skills in students and enhancing their employability. Dr. McKeever in his research contends that there are, however, tensions between the core university objectives of teaching, research and the student experience and the ambition to promote or develop social justice.[111]

In the early 1900's Harlan Fiske Stone (1911:733), lawyer and Dean of Colombia Law School, declared:

> *"If it is true that the function of the law school is to approach the study of law from the theoretical and scholarly side, it is equally true that it must not become so academic as to separate itself from the*

[108] ibid at 74.
[109] ibid at 65.
[110] Dr. Grainne McKeever, "The Role of University Law Clinics in Delivering Access to Justice", Knowledge Exchange Seminar Series (KESS) 2015-2016. www.niassembly.gov.uk accessed on 28th May 2021.
[111] ibid at 110

> *profession which it represents and for the practice of which it undertakes to train its students".*[112]

But the discussion about law clinics had begun much earlier. Indeed, Professor Alexander I. Lyublinsky in 1901 expressed the need for a new approach in the training of lawyers.[113]He opined that the approach to the training of lawyers ought to be similar to the clinical approach used in the training of medical practitioners. In the training of medical practitioners, medical students are expected to train with real patients, under the guidance and supervisions of experienced physicians. Law students are expected to acquire skills which they require to practice law by dealing directly with real life cases and scenarios.[114]

According to Ulla, doctrine, theory, and skills cannot be appreciated if they are introduced without engaging the pathos of the human issues that the lawyer encounters when representing clients.[115] Since the start of the 21st century there has been a vast movement towards clinical legal education approach. It is believed that this approach will serve a dual purpose in developing countries. By dealing with real life scenarios, students familiarize themselves with the direct impact of the law on the lives people, how to think critically and apply the law to the cases which they are confronted with through in-depth research, analysis and critical thinking and how to deliver legal services ethically.[116]

It is therefore the contention of this paper that clinical legal education is a vital tool which is needed in the new Kenyan legal education pedagogy. Thus, attendance and participation of students at the law clinics will build the capacity of law students and help them to understand their role as upholders of the law in their society.

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112 Vicky Kemp *et al*, "Clinical Legal education: Looking to the Future." The University of Manchester, The School of Law, (2016).

113 Sarker SP (ed.) *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (2015) 22.

114 Sarumi Rofia, "Legal Education in Nigeria and the potential role of university law clinics in facilitating access to justice and the realisation of human rights in Nigeria.

115 Ulla S „Clinical legal education, role of lawyers and jurists in establishment and functioning of clinics" available at http://www.academia.edu/10837482/ClinicalLegal Education Role of lawyers and Jurists in Establishment and Functioning of Clinics.

116 Supra (n 114).

The word 'clinic' or 'clinical' is applied where real or realistic situations serve for students to engage in legal casework or address and analyze legal issues. It follows that learning of this type is experiential, and involves both the experience and a structured facility for reflection and (possibly) re-application.[117] Without having some form of structured opportunity for reflection, most clinicians agree that student exposure to real or realistic cases is little more than 'work experience'.[118] Clinic also describes a constructivist teaching methodology in which learning is not something that happens passively but requires students to participate actively and construct their own knowledge.[119] According to Sylvester, although constructionist teaching methodology facilitates discipline and procedural legal knowledge it is recognized more for teaching legal and intellectual skills and inculcating professional values and ethics as a result of involvement in social justice.[120]

As with the traditional approach to the training of lawyers in Kenya, students at the LLB undergraduate level do not get the opportunity to actively participate in projects or programs which engage the society and which expose them to the practical aspects of the legal profession. This is unlike the situation in developed countries like the United States of America where undergraduate law students are given the opportunity to build the skills of the profession as students.[121]

This paper maintains that the interaction of students with the poor community members will perform two roles in their academic achievements. It will boost their understanding of the theoretical aspects of the law while helping them to build the skills which they require to practice as lawyers and advocates of the High Court. While the clinical legal education pedagogy will facilitate access

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117 Grimes, R. and Gibbons, J. (2016) 'Assessing Experiential Learning – Us, Them and the Others', *International Journal of Clinical Legal Education* 23:1. http://dx.doi.org/10.19164/ijcle.v23i1.492

118 ibid.

119 Ledvinka, G. (2006) 'Reflection and Assessment in Clinical Legal Education: Do You See What I See'. International Journal of Clinical Legal Education, 9, 29. http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/86/89 accessed on 23rd May 2021.

120 Sylvester, C. (2016) 'Through a Glass Darkly: Assessment of Real Client, Compulsory Clinic in an Undergraduate Law Programme', *International Journal of Clinical Legal Education, 1, 23.* https://www.northumbria.ac.uk/media/6285011/through-a-glass-darkly-assessment-of-a-real-client-compulsory-clinic-in-an-undergraduate-programme-cath-sylvester.pdf accessed on 23rd May 2021.

121 Wilson RJ "Training for Justice: The Global Reach of Clinical Legal Education." (2003) 22 *Pennsylvania State International Law Review* 421.

to justice in the community, the focus is on the advancement of the students. Thus, by participating in clinical law programmes, students would gain skills which are essential for fact-finding, investigation, interviewing, and legal research and writing.[122] In addition to the skills acquired, students would also develop sensitivity and responsiveness to the plight of the people they work with. These are the main drivers of social justice, and these would propel law students into the right paths as harbingers of justice.[123]

The Role of Legal Clinics in Promoting Access to Justice

In order to understand the role legal clinics can play in promoting access to justice to the poor and vulnerable members of the community, it is imperative to understand the nature and goals of Clinical Legal Education (CLE) which gives the framework for the operation of legal clinics.

CLE can be defined as "a program that teaches through direct experience of lawyering, under the supervision of practicing attorneys/teachers, characteristically in work that advances social justice or the public interest."[124] From this definition, it must be clear that any teaching model that aims at instilling skill to law students is not CLE. For the teaching approach to be taken as CLE, it should combine community service with practical student learning.[125] Thus, a legal education model exclusively relied on simulation is not CLE as it does not allow students' "involvement with real clients in an environment supervised and controlled directly by the law school."[126] Moreover, the participation of law students in the provisions of legal aid services in law schools legal aid centers cannot be regarded as clinical education. This is because students are not required to register as a course, assessed based on their performance and do not earn academic grades for their activities. One important point to add is that as long as clinical programs are incorporated in law curriculum with a broader mission of exposing law

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122 Kalantry S, Brundige E and Gupta P, *Promoting Clinical Legal Education in India: A Case Study of the Citizen Participation Clinic* Cornell Law Faculty Publications. Paper 1401 (2012)1.

123 Atim P'Odong P, Mbazira C and Oryema S *Educating Lawyers for Social Change: The Role of University Based Legal Clinic: The Case of Pilac (Public Interest Law Clinic University of Uganda)* available at http://pilac.mak.ac.ug/sites/default/file/educating lawyers for social change.

124 Clinical Legal Education Association Handbook for New Clinical Teachers, April 2007, p.10.

125 Jeff Giddings, Promoting justice through clinical legal education, Justice Press, 2013, p. 4.

126 Richard Lewis, Clinical Legal Education Revisited, p. 6.

students to experiential learning and promoting social justices, there is no single way for their operation. CLE may follow quite a diversity of approaches depending on the curriculum of law schools, legal setting of jurisdictions in which it operates, types of social justice issues it seeks to address and resources available in law schools.[127]

CLE as a teaching methodology was originally introduced in a few law schools of the United States and was later expanded to all US law schools and transplanted by law schools of other countries around the world. Writers believe that the first wave of clinical legal education in the United States started at the beginning of the twentieth century.[128] There were, however, a few law schools that had clinical legal education programs until the 1960s mainly due to the fact that "law schools of this era were terribly underfunded and clinical legal education courses with intensive faculty supervision were not as economical as large classes employing the casebook Socratic Method."[129] Availing themselves of initial funding from the Ford Foundation and driven by the need to promote social justice, the majority the US law schools introduced CLE in the late 1960s and early 1970s.[130] Nowadays, CLE is implemented in all US law schools and other law schools in Canada, Great Britain, Australia, Latin America, Europe, China, India Israel, and Africa.[131]

The authors further submit that be it in the US or other countries, the main reason for consolidation and expansion of clinical legal education is the need to promote social justice in general and access to justice to the poor and vulnerable members of communities in particular.[132] Although it is globally recognized principle that "any country's system of justice must be accessible to all of its citizens," the situation on the ground tells us that lower income and other disfavored groups of citizens "are unable to benefit from relief that might be available through their local legal systems."[133] Legal clinics played and

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127 Frank S. Bloch, Access to Justice and the Global Clinical Movement, Wash. U. J. L. & Pol'y, 2008, Vol. 28, p. 118.

128 New York State Judicial Institute Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar Introduction to Clinical Legal Education May 9, 2005, p. 1.

129 ibid.

130 Wizner, Stephen, "The Law School Clinic: Legal Education in the Interests of Justice" Fordham Law Review, Vol. 70 (2002), pp. 1933-34.

131 See also T.O. Ojienda and M. Oduor, Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya, International Journal of Clinical Legal Education 2002, Vol. 2, 52.

132 Supra (n 124).

133 Supra (n 120).

continue to play their pivotal role towards meeting the access to justice needs of these members of the community. They do this in three ways.

Firstly, lack of money is the main obstacle that prevents people from accessing justice in some countries. When access to justice is hindered for lack of money, provision of legal aid to the indigent is an approach country have adopted to address the problem. The legal aid to be provided may extend from provision of legal advice to representation of these people before judicial and quasi-judicial bodies. Legal clinics play important role in the provision of legal aid in civil and criminal matters in many countries.[134] Secondly, in many developing countries, "justice is inaccessible to a large number of people simply because they are unaware of laws and legal institutions, not to mention specific legal rights."[135]

To address this specific problem of access to justice, several countries have employed legal literacy programs and campaigns with a view to instilling basic legal awareness to citizens. These kinds of programs have been applied, for example, in India, Chile and South Africa partly through the involvement of legal clinics.[136] Thirdly, in some cases, citizens do not access justice not just because they do have the means or do not know the institutions, laws and their rights but because the legal system itself restricts access to legal and justice institution or legal remedies.[137] In this case, legal clinics can play an important role by challenging the status quo and pushing for legal reform.

As elsewhere, the purpose of inclusion of clinical courses in LL.B curriculum and establishment of legal clinics in Kenya is twofold.[138] First, they are meant to be legal laboratories in which students learn the practical application of the law. Second, they are intended to be avenues through which law school students contribute to the furtherance of access to justice to the poor and vulnerable members of the community.

Thus, given the legal and practical challenges that hinder the utilization of the various mechanisms of ensuring access to justice to the marginalized and the

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134 ibid.
135 ibid.
136 ibid.
137 ibid.
138 See Mizanie Abate Tadesse, The Manual on HIV/AIDS Legal Clinic (Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009), art. 3(1) [Herein after Manual on HIV/AIDS Legal Clinic].

poor, law school legal clinics are attractive and viable options to meet the access to justice needs of the poor and the vulnerable in Kenya.

Therefore, this paper contends that the legal education providers have a role in preparing the next generation of lawyers the values, skills and knowledge necessary for the delivery of the constitutional promise of access to justice. This calls for the legal education providers in Kenya to place the issue of access to justice at the center of legal education with an understanding that access to justice is fundamental to establishing and maintaining the rule of law as a constitutional principle and value. This would enable Kenyans and especially the vulnerable members of the society to have their voices heard even as they seek to exercise their legal rights. Furthermore, access to justice is an indispensable factor in promoting citizens' empowerment, in securing access to equal human dignity and in social and economic development.

This paper calls on legal education providers in Kenya to do more to educate themselves, their students and the public about the systematic challenges and failures in the Kenyan justice system. They should make a commitment for implanting values of equal justice in its students, and should have their priorities reflecting that commitment.

There is need for legal education providers to develop strategies that would make access to justice more central in legal education. Further, it is argued that a framework that focuses on clinical legal education aligned with other people-oriented and critical skill sets are not only useful but also deemed necessary for enhancing access to justice in our country. Clinical legal education will not only provide these future lawyers with the skills necessary for becoming a better lawyer but also enact positive change in the society.

Indeed, teaching the next generation of lawyers the values, knowledge and skills needed to deliver on the promise of access to justice is paramount. In order to achieve this, this paper contends that law schools in the country should position the issue of access to justice at the center of legal education.

In 2015 the United Nation Member States, in the 2030 Agenda for Sustainable development, adopted Sustainable development Goals in recognition of continuing poverty around the globe. Goal 16 specifically directs all countries to provide access to justice to their residents.[139] Drawing on the power of the data revolution, and explicitly asserting that access to justice reduces poverty,

[139] https://sdgs.un.org/goals accessed on 25th of May 2021.

the sustainable goals require countries to track, publish and compare data as a means of accelerating progress to achieve those goals. The said goal 16 enjoins all member States to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.[140]

This paper calls upon all law schools in the country to rise up and confront the legal system's limitations, and to do this we must come to the realization that the legal profession has a direct stake in ensuring that every student appreciates the importance of access to justice to enable every person to secure the rights implicit in the promise of equal dignity under the Constitution. Fortunately, a number of law schools are taking critical steps in the right direction. The Egerton University Faculty of Law Legal Aid Project with main objective of facilitating enhanced access to justice by the marginalized and poor in Nakuru County, is timely and a bold step in dealing with justice gaps in the region. While this paper acknowledges the existence of similar legal aid programmes in other law schools University of Nairobi, Strathmore University and Moi University, the paper contends that there is need for a more structured legal aid programmes within all law schools in the country.

The paper suggests that all law schools in the country must seek to bring the significance of adequate representation to the fore throughout their law curriculums, educating students about the justice gaps and opportunities for reform. This may call for inclusion of community service as one of the core missions for universities apart from teaching and research. This Paper while being cognizant of the fact that access to justice is the mandate of the state as provided for in the international, regional and domestic legal instruments as has been highlighted in this paper, the universities must realize that they have a moral duty to for community service.

This paper is well aware of the difficulties facing legal education and that they are many, including financial constraints, challenging job market for new lawyers, but the paper submits that legal clinics will help every law student to appreciate and understand the value of access to justice to every client, and as legal education comes to grips with the challenges, prioritizing access to justice through legal clinics aligns with the best and highest goals of the legal profession. It also provides meaning to law students. They come to law school to launch careers, whether in private practice or public service, that relies on the law to make a difference in people's lives.

[140] ibid.

Other actors in our legal system — from our courts, which are already a site for innovation and reform, to the bar and many other international and local organizations — are already working together to confront deep inequities in our justice system. In joining in these efforts, and placing access to justice at the center of what they do, law schools in the country can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under our Constitution. This paper maintains that through the law clinics which are attached to the faculties of law in the Kenyan Universities, law students can translate the legal principles which they are taught into relevant legal advice which will be useful for members of their communities especially in civil and criminal matters. This will be on a *pro bono* basis and while the services will facilitate access to justice for the indigent and vulnerable members of the society, it will also build the capacity of the law students and help them to develop the skills which they need to become better lawyers.

Recommendation on the Structure, Programmes and Curriculum of the University Law Clinic in Kenya

In order to meet the purpose of the law clinic, it is important that the law clinic engages in programmes which will facilitate the development of lawyering skills in students and which ensure access to justice especially for the poor people within the communities. In order to achieve the objectives for the creation of the law clinic, the following structure, programmes and curriculum are suggested:

(i) Organisation

Setting up the law clinic on a strong administrative structure and foundation is important as this will go a long way in ensuring the achievement of its aims. It is recommended that the law clinic is situated within the law faculty and the staff of the law faculty should head the administration of law clinic. The members of staff are also the most appropriate personnel to direct the activities of the clinical groups. The law students who are registered for the clinical modules can also volunteer as staff of the clinic.

According to Qafisheh, it is most appropriate that the law clinic be positioned as a department within the law clinic and not as a project of the law faculty.[141] It is therefore necessary that in order to achieve success in facilitating access to justice and to serve as a laboratory for students, the law clinic must be given an individualistic and distinctive status. This structure must be similar to a research center within the law faculty.

(ii) Curriculum and Programmes

As earlier noted in this paper in the foregoing sections, the main role of the law clinic is to serve as a laboratory where undergraduate law students can learn lawyering skills by handling real life cases from within their communities. In the process, they will facilitate access to justice for the clients whom they deal with at the law clinic.

This paper contends that clinical projects need to form a huge part of the curriculum of the undergraduate legal education in Kenya. The clinical projects should be offered for credits and these should be graded according to the university regulations. Students who participate in the practical modules should be required to volunteer in *pro pono* activities where they would earn points and these points would be added to their final grades.

(iii) Accessibility

Accessibility refers to the physical and substantial access of the law clinic to the members of the community. The location of the law clinic should take the members of the community into account. It is important that the law clinic is situated at a place which is assessible to the members of the community especially if it is situated within the premises of the host University or law faculty. Universities are landmarks and are often accessible to the general public. It is nonetheless necessary for communities to be made aware of the existence of law clinics and the fact that they provide free legal services.

The clinic should also endeavor to provide services to people in the languages which they understand and which they feel most comfortable in. Thus, students should be able to communicate in local languages so that they can secure the confidence of their clients.

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141 Qafisheh MM, "The Role of Legal Clinics in Leading Legal Education: The Model from the Middle East" (2012) 1 (22) *Legal Education Review* 177.

CONCLUSION

There is no denial that access to justice though a fundamental right as provided for in the Kenyan's constitution and other international instruments as briefly discussed in this paper, there exists justice gaps within the Kenyan's society as demonstrated in part one of this paper. It is also the case that law clinics have been instrumental in securing social change in many countries of the world. It is also a fact that the current Kenyan's undergraduate legal education curriculum offers a lot for facilitating the students‟ understanding of the traditional legal theories which are crucial to the training of lawyers. It is nonetheless crucial that the curriculum embraces the global trends in the training lawyers so that it meets the ever-changing needs of the legal profession and the society at large.

The introduction of clinical legal education into the undergraduate legal education curriculum exposes students to the skills which are essential for successes in the legal profession. Clinical legal education helps students to contribute to the realization of social justice and facilitation of access to justice to the poor and marginalized groups their communities. Therefore, it is this paper's contention that by placing access to justice at the center of what they do, legal education providers can play an important role in crafting solutions, providing service and, most importantly, educating the next generation of lawyers so we can deliver on the promise of equal justice under our Constitution.

The Jurisprudential Basis of Traditional Justice Systems as an Enabler of Legal Aid and Access to Justice in Kenya

PLO Lumumba* and Evans O. Ogada*

ABSTRACT

This paper examines the role of traditional justice mechanisms in enabling access justice and function of Legal Aid towards achieving access to justice to the extent that it is germane. The import of administration of justice denotes the possibility for an individual to bring a claim before a Court for adjudication, nevertheless, at its core, access to justice is premised on the ability of court users to understand the process in which they participate and to be meaningful participants in the justice system. Access to justice catered for only by means of formal justice systems suffers, since the formal systems alone cannot provide adequately for this public good. Therefore, it is not a surprise that alongside formal Court processes, the emerging issue is the place of traditional dispute resolution mechanisms in enhancing access to justice is fast gaining a reawakening. Access to justice cannot remain only an object of formal justice mechanisms. Access to justice in the narrowest sense may mean a guarantee to remedial mechanisms such as access to court or alternative dispute resolution bodies; however, this position is anomalous since the prerequisite for the so-called alternative dispute resolution presupposes a pretentious superficial substitute. Access to justice in the context of alternative dispute resolution mechanisms enables the enforcement of rights in the context of social and cultural milieu. Conversely, access to justice in the broader sense, denotes an engagement with the wider social context of the indigenous governance systems. Extant evidence demonstrates that access to justice is undermined by lack of legal literacy and in most cases indigence. The paper will explore the place of Legal

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Aid in promoting access to justice in its broader connotation, in all judicial and quasi-judicial fora and other fora afforded by traditional systems. This paper will examine access to justice in the context of the Constitution of Kenya 2010 and such Laws as have been enacted to undergird legal aid.

Key Words: Access to justice, alternative dispute resolution, dispute resolution and legal aid.

INTRODUCTION

Access to justice, as a concept in social science, lends itself to a variety of meanings.[1] Generally, however, it has been argued to denote the possibility for the individual to bring a claim before a court and have a court adjudicate it.[2]Access to justice broadly understood however denotes the availability of dispute resolution platforms through which people are enabled to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[3] Access to justice can be gauged by the extent to which people can seek and obtain remedies against grievances through state and non-state mechanisms.[4] In order to enhance access to justice, legal aid measures that include assistance in the resolution of matters through alternative dispute resolution mechanism have been identified as possible panacea to the challenges of access to justice.[5]

Legal aid objectives are stated to include *inter-alia*, the provision of affordable, accessible, sustainable, credible and accountable legal aid services to the poor and equally, the promotion of alternative dispute resolution methods as enablers of access to justice.[6] Legal aid as envisaged under the Legal Aid Act is anchored in strict, formal traditions of government

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1 Francesco Francioni (ed.)., The Development of Access to Justice in Customary Law in Francioni F, *Access to Justice as a Human Right*, Oxford University Press, (OUP 2007) p.64.

2 ibid.

3 United Nations and the Rule of Law, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed on 15 April 2021.

4 Benjamin van Rooij, Ineke van de Meene, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation,* (Leiden University Press, 2008) p.15.

5 Legal Aid Act 2016, s2.

6 ibid s3.

bureaucracy as it is to be shepherded by a Legal Aid board[7], which shall be funded from the public coffers.[8] Legal aid has faced significant challenges universally such as massive underfunding and overwhelming workloads in its formalist disposition.[9] The formal orientation of the Legal Aid Act draws from the notion of legal centralism, which claims that law is and should be the law of the state; uniform for all persons, exclusive of all other laws and administered by a single set of institutions.[10]

Whereas countries have put in place laws that anchor legal aid, the actualization of legal aid has been a mirage due to several challenges and these challenges have put paid to the rolling out efforts and therefore legal aid remains largely a concern for charitable organizations.[11]

In the Kenyan context, legal aid under the law is pegged to certain limitations, such as that a case must be sufficiently important, that there must be a reasonable chance of success and that there must be enough funds available.[12]It therefore appears that access to justice through the formalized legal aid structures would still not offer adequate remedial mechanisms for dispute resolution if the dispensation of justice is to be examined through an exclusive formal lens. Therefore, alternative justice mechanisms, especially through traditional justice means can provide much needed succor in platforms for legal aid provision in an affordable, widely and easily accessible manner and to a good number of people within their locality. African legal systems and values can be of utility in advancing the objectives of legal aid, which among others has been stated to be to facilitate access to justice.[13]

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7 ibid s9.

8 ibid s29.

9 Ole Hammerslev, Olaf Halvorsen Rønning, 'Legal Aid in Nordic Countries' in Hammerslev O and Halvorsen Rønning O(eds.), *Outsourcing Legal aid in the Nordic Welfare States*, (Springer International Publishing AG, Cham, 2018) p.2.

10 Thandabantu Nhlapo et al, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (OUP Southern Africa (Pty) Limited 2014) p.94.

11 Ole Hammerslev, Olaf Halvorsen Rønning, (eds.), *Outsourcing Legal aid in the Nordic Welfare States*, pp.2-3.

12 Legal Aid Act 2016, s36(4).

13 Legal Aid Act 2016.

Justice and African Customary Societies

African laws and African jurisprudence have always faced a barely hidden undercurrent of denial of their potential contribution to jurisprudence.[14] African customary laws have never been treated in a disrespectful manner, and considered as bearing no legal value, especially in the colonial context. The colonialist bore in them an engendered stereotype that the 'natives' were lex nullius: a condescending attitude that the locals had no laws.[15] The colonial experience imposed transplanted western prototypes, mono-legal regulation systems that were thought conducive to 'justice'.[16]

Contrary to the misplaced belief that Africans had no laws, traditionally, many African communities, had laws and legal systems that elevated justice as the first virtue of social institutions, because emphasis was on (building and) restoration of harmonious societal relationships as opposed to reliance on abstract notions of justice that are prevalent in the contemporary world.[17] African societies had vibrant legal cultures, legal culture in this sense denoting relatively stable patterns of legally oriented social behaviour and attitudes.[18] The pharaonic Egyptian civilization for example, can easily be claimed 'to be the cradle of one of the earliest and most spectacular civilizations of antiquity', with a vibrant subsistence economy and vibrant governance structures. [19]

Justice in today's world does not lend itself to a singular definition. However, it is generally understood as a concept imbued with morality. Justice as understood in traditional African societies denoted the will to respect the order of the human world and to recognize in word and deed anything that

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14 Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, (Cambridge University Press 2006) p.380.

15 Supra (n 10), pp.36-37.

16 Supra (n 14), p 61.

17 George Ayitteh, *Indigenous African Institutions*, (Transnational Publishers, Inc., 2006), p.34.

18 David Nelken, 'Legal Culture' in John Smits, *Elgar Encyclopedia of Comparative Law*, (Edward Elgar Publishing Limited, 2006), p.374.

19 Bruce Graham Trigger, *The Rise of Civilization in Egypt* in Desmond Clark (ed.), *Cambridge History of Africa*, (CUP,1982),p.478.

belonged to another.[20] Justice was broadly understood as fair rules in the way they distribute benefits and burdens between a set of claimants.[21]

Questions of justice and good governance arose whenever social institutions and practices affected the distribution of societal values. Thus, justice was the standard/principle by which weight was assigned to other values. It was an organizing concept for good governance.[22] Customary laws, as indicators of societal values in traditional African societies, were conventions and enforceable rules that materialized and were respected spontaneously without formal agreement, as people went about their daily business and in an effort to solve myriad problems that emerged without upsetting the patterns of cooperation on which they heavily depended.[23] Customary rules did not emerge from litigation but rather were a product of practices prompted by the convenience of society and of the individual.[24]The maintenance of peace within most African communities followed four principles; first, settlement of disputes was through deliberation and discussion rather than force; second the correction of wrongdoing was by means of compensation rather than punishment except in serious offences such as murder; third dispute settlement was conducted by means of adjudication and assessment by elders who were considered to be impartial and fourthly, dispute settlement was expected to be fair.[25]

It should be noted that a good number of African societies possessed a diversity of courts, which courts were hierarchically structured to deal with disputes, emphasis being that issues were to be resolved peacefully. The types of courts that could be found in the various African traditional societies included the moot, the family, the ward, the chief's and the king's court, such that disputes involving siblings were to be resolved in a family court while disputes involving members of different clans were to be dealt with in the chief's court.[26] Cosmological factors provided additional reasons for the need for pacific settlement of conflicts, since Africans stressed the

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20 George Ayitteh, *Indigenous African Institutions*, (Transnational Publishers, Inc. 2006) ,p.68.

21 Steve Nwosu., '*The Ethics of Justice and Good Governance in African Traditional Society*', Journal of Democracy and Nature, 2002, p.469.

22 Steve Nwosu., 'The Ethics of Justice and Good Governance in African Traditional Society', (2010), 8(2) Journal of Democracy and Nature, p.469.

23 Supra (n 20).

24 Kofi Quashigah 'Justice in the Traditional African Society within the Modern Constitutional Set-up' (2016) 7(1) Journal of Jurisprudence, p.96.

25 Supra *(*n 20), p.72.

26 Supra (n 20), p.72.

maintenance of order and harmony in the universe which consisted of the sky, the earth and the world.[27] Order and harmony in the universe necessitated the maintenance of corresponding conditions within the community such that among the Gikuyu of Kenya for example, elders considered as their primary duty the prevention of intra and inter lineage strife as well as the prevention from resorting to supernatural powers and hostilities.[28]

In essence, law and justice in the pre-colonial African communitarian settings rejected the notion of *homo homini lupus* (a man is a wolf to another man), where law as a social construct operated within the context of an African worldview that emphasized the survival and interests of the entire community, a sense of cooperation and interdependence as well as collective responsibility, as opposed to the liberal (western) oriented position that glorified individual interests above all else.

African Legal History

Contrary to what has been popular fad, law and legal systems did exist in traditional African societies. African laws (indigenous or chthonic law) applied to a particular community, tribe or ethnic groups because the ethical basis of the principles of their law is indigenous to that particular group. Indeed the argument was that indigenous African societies were without law.[29] Africans treated chthonic laws as an extension of morality and in that sense, morality and law are fully complementary. Law was inter-linked with the socio-cultural environment. African legal systems bore elements of similarity to ingredients of any other legal system in the world, that is legal systems have been claimed to be bonafide if they have procedures, principles, institutions and techniques. [30]

Pre-colonial law in Africa operated in a community setting, which must be understood from the standpoint that government and the processes of law and dispute-settlement were mostly confined within a community of limited area and population lent a distinctive character to African law. The judge was not a remote member of an official order, but the man in the next hut,

27 ibid.
28 ibid.
29 Supra (n 10), p.36.
30 Supra (n 14), p. 83.

rendering justice according to the conventions or mores of the community.[31] Laws were significantly integrated in the society, flexible and dynamic.[32] Rules of law were seldom visible to the casual observer as they were not codified but nonetheless formed part and parcel of the fabric of local tradition.[33]During the colonial period, legal systems were characterized by legal pluralism, legal pluralism being the recognition of two or more legal systems or normative orders and where the traditional legal system had to grapple with imported, largely positivist legal systems of the colonial powers.[34] The colonial interference caused a bifurcation of law into what was termed as customary law (law associated with the various tribes, communities or ethnic groups) and state law (law associated with the colonial administration). The law applicable in colonial Africa modelled on western systems and very obviously reflected the legal ideas of the colonizing nation in question.[35] In the colonial period, there were, generally speaking, two types of courts: those applying customary law exclusively and those applying only the "modern" law.[36] This duality has been questioned ever since African countries gained their independence.

The post-colonial period saw cross-roads emerge, whereby the colonial legal system had to co-exist with the traditional legal dispute settlement mechanisms that remained resilient. The post-colonial period has seen the dominance of Eurocentric transplants of law dominate African (autochthonous law) as means of continued marginalization of everything African.[37] In these plural legal systems, customary laws exist side by side with the introduced "modern" laws; the expectations within the two different legal spheres often create conflicting situations where justice is interpreted in accordance with different and often conflicting conceptions of values.[38]The conflict between sedimented western legal values and autochthonous legal norms was evidenced by the dilemma faced by judges sitting in the Supreme Court of India in the case of ***Rattan Lal v. Vardesh Chander****,* which pronounced itself thus with regards to conflicting legal norms:

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31 ibid*,* p.437.
32 ibid*,* p.405*.*
33 ibid, p.406.
34 Supra (n 20), p.96.
35 Supra (n 14), p.448.
36 Supra (n 14), p.453.
37 Supra (n 14), p.453.
38 Supra *(*n 14), p.96.

> *We have to Part Company with the precedents of the British-Indian period tying our non-statutory areas of law to vintage English law, christening it 'justice, equity and good conscience'. After all, conscience is the finer texture of norms woven from the ethos and life-style of a community and since British and Indian ways of life vary so much the validity of an Anglophilic bias in Bharat's justice, equity and good conscience is questionable today. The great values that bind law to life spell out the text of justice, equity and good conscience and Cardozo has crystallized the concept thus: 'Life casts the mould of conduct which will someday become fixed as law'. Free India has to find its conscience in our rugged realities – and no more in alien legal thought. In a larger sense, the insignia of creativity in law, as in life, is freedom from subtle alien bondage, not a silent spring nor a hothouse flower.*[39]

Colonial Impact on African Law and Legal Systems

The colonial impact on African law and traditional legal systems must be examined in the context of the entire colonial period, which is largely blamed for under developing Africa.[40] Africa was drained of her resources as colonialism was largely an extractive adventure,[41] and with regard to indigenous institutions that included customary legal systems were significantly altered.[42] Colonialism claimed to have a civilization intendment, civilization being the rule of law in the context of legal order.[43] The colonial courts were intended neither just as sites where disputes would be settled nor simply as testimony to effective imperial control; rather, they were to shine as beacons of Western civilization.[44] The intention that western legal transplants assume hegemonic supremacy over traditional laws and systems must be seen from the prism of state centralization in the colonial

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39 Rattan Lal v. Vardesh Chander (1976) 2 SCC 103, at pp. 114–15, per Krishna Iyer J

40 See generally Walter Rodney, *How Europe Underdeveloped Africa*, (Bogle-L'Ouverture Publications, London and Tanzanian Publishing House 1973).

41 Supra (n 17), p.459.

42 The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems)*, (Judiciary of Kenya, 2020), xiv

43 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, New Jersey, 1996, p.109.

44 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* (Princeton University Press, 1996), p.109.

era. Law in the atmosphere of statecraft assumes a constitutive dimension.[45] In the constitutive dimensions the state includes a cascade of legally-dispensed authorizations; this is what gives the state its empirical and conceptual unity. [46] Therefore, the superimposition of western laws over African laws and legal systems was a power and control dynamic that fit within the whole colonial scheme of pillage and subjugation.

The nefarious effects of the colonial adventure on African traditional law and legal systems are well documented. There were at least three authority centres that strived for supremacy over the defining content of customary laws: the central state, the officials of the local state (the chiefs), and a range of non-state interests.[47] The claims of the central state always carried the day as it (the central state) set the limits of customary laws through the use of the so called 'repugnancy clause'.[48] The repugnancy doctrine as a tool for legocentralization was used to transform African Customary laws in the image of the colonial power, requiring the non-enforceability of African customary law if they were deemed 'repugnant to justice and morality.'[49] The repugnancy test was in part intended to elevate African societies closer to the level of British civilization,[50] a scheme that was aimed at social engineering. The colonial administrators were clear eyed in understanding that customary law was a way to shape society and those changes in society and in law were intimately interconnected.[51] The strife for control over the courts and the use of conceptual tools such as the repugnancy clause, generated in an environment in which there was a vicious struggle to seize control over the law generally was an exercise by the colonial administrators at fending off any perceived threats to their coercive control

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45 George O'Donnell, *Democracy, Agency, and the State: Theory with Comparative Intent*, (Oxford University Press, 2010), p.119.

46 ibid

47 Supra (n 43), p.115.

48 ibid

49 Supra (n 42), p.2. **See also Judicature *Act***, Chapter 8 Laws of Kenya, s3(2). The said section states that,' *The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay*.'

50 Brett Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60], (1999) Journal of African History, 40 (3), Cambridge University Press, p.415.

51 ibid p.415.

generally and specifically, over law and over the bodies that applied it.[52] The inevitable outcome of state centralization with regard to judicial functions and the use of control conceptual tools such as the repugnancy doctrine meant that Africans were denied the meaningful usage of their traditional cultural heritage as 'traditional Africans perceived themselves as tied in with everything around them, applying culture-specific holistic, chthonic perspectives as a fertile conceptual base for the production of innumerable legal systems.'[53]

The Future of Stifled African Dispute Resolution Mechanisms in Enhancing Access to Justice: A Re-think of Legal Aid Formalism

The Kenyan legal system is a reflection of the colonial past. The manner in which it operates today, which is steeped in adversarial and procedural rigours as well as being costly is a reflection of the colonial legacy. Access to justice therefore remains a mirage for a considerable majority of Kenyans owing to the historical structural nature of the formal judicial process. The formal judicial process is characterized by a single and nationally funded structure that has resulted in among other challenges, case backlog,[54] with some cases taking years before they are resolved. Other concerns that have been identified as characteristic of the formal dispute resolution system include negative perceptions about the formal justice system, with the resultant effect being that few people resolve their disputes through the formal court system.[55]

Legal Aid as structured under the Legal Aid Act is aimed at operating within the current formal judicial structures. For example, a court is saddled with the duty of informing the National Legal Aid Service to provide legal aid to the accused person who is facing a criminal trial.[56] Whereas the Legal Aid Act envisages the promotion of alternative dispute resolution methods in order to enhance access to justice in accordance with the Constitution, alternative dispute resolution is said to be capable of being offered by an employee of the National Legal Aid Service or a person or institution with

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52 ibid p.416.

53 Supra (n 14), p.381.

54 **See generally** Judiciary of Kenya, *State of The Judiciary and The Administration of Justice Annual Report 2018 -2019,* Judiciary of Kenya, 2019.

55 The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems*), Judiciary of Kenya,9

56 Supra (n 13), s43.

expertise in the area of alternative dispute resolution that is engaged by the National Legal Aid Service specifically to conduct an alternative dispute resolution programme.[57] Another aspect of formalism in the context of legal aid is that anyone desirous of legal aid assistance must formally apply in writing for consideration.[58] African traditional dispute resolution mechanisms are implied to denote informal means of dispute resolution mechanisms by definition in the Legal Aid Act.[59] African traditional dispute settlement methods cannot be accommodated in the manner prescribed in the Legal Aid Act, which is under conditions of strict formalism. The Legal Aid Act has to be substantially amended to appreciate the nature of African traditional dispute mechanisms. The interlinkage between formal legal processes and African traditional dispute resolution methods is provided by the Judiciary's policy document, the Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems) which calls for the formal recognition of Alternative Justice Systems as the first step in animating them.[60]

Animation of African Traditional Justice mechanisms as part of a wider rubric called Alternative Justice Systems must be done, with a mental frame adjusted for a paradigm shift. Traditional dispute resolution mechanisms must be dealt with outside the confines of the straightjacketing of formal judicial processes and its rigours as platforms for access to justice. In mainstreaming traditional justice methods as avenues for offering legal aid as means of broadening access to justice, traditional dispute methods must be incorporated as a meaningful constitutive dimension of the state, as a bonafide cascade of legally-dispensed authorizations in an endeavor to give the state its empirical and conceptual unity.[61] It means that traditional dispute resolution methods must be accepted and mainstreamed as an acceptable and inextricable aspect of socio-cultural life. Traditional African dispute resolution mechanisms should also be incorporated as means for dispute settlement for the reason of their tenacity.

Traditional methods of dispute resolution continue to be used today and mainstreaming their use only validates what already exists. Most importantly, it should be part of our conscience awakening as a people to re-connect with our heritage, which fell prey to the vagaries of colonialism. The

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57 Supra (n 13), s39.
58 Supra (n 13), s40.
59 Supra (n 13), s2
60 Supra (n 55), p.91
61 Supra (n 45), p.119.

erasing, the destruction of African cultural heritage, our historical conscience was part of the techniques of colonization, which period was marked with enslavement and debasement of our people.[62] Therefore, in recognizing traditional dispute mechanisms as meaningful, mainstream and acceptable aspects of our culture, we recognize that the dominant positivist and statist assumptions about law has never existed in isolation from other perspectives and that law is embedded and linked to our societal values.[63]

Legal aid is aimed at the indigent people of Kenya as the reality for the poor majority in Kenya is that is that justice is not accessible to them on an equitable basis.[64] Improving access to justice through the medium of legal aid can benefit from traditional dispute resolution mechanisms but only if legal aid and the law anchoring it discards the rigidity of formalism and embraces traditional dispute methods in their chthonic sense.

CONCLUSION

The noble desire to have legal aid as an enabler of access to justice is laudable. However, legal aid objectives will be a struggle to achieve if they are pursued through purely formalist means, a bequeathed heritage of colonial legal transplants.

African dispute resolution mechanisms can offer respite to the challenges facing legal aid and formal judicial processes generally, such as prohibitive costs and case backlog but only if incorporated into legal aid mechanisms while respecting the chthonic and inherent characteristics of traditional African law and legal systems in their reverse forms.

Understanding how African dispute resolution mechanisms operate is key to incorporation of traditional dispute methods as meaningful contributors to legal aid. Appreciating law as an intricate societal concern must be internalised in light of our unique anthropological placing as a civilization. Unless one is intimately familiar with the ontological commitments of a culture, it is often difficult to appreciate or otherwise understand those commitments. Perhaps through comparing salient aspects of Western and traditional African conceptions of personhood, we can realize a more

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62 Cheikh A. Diop, Yaa-Lengi Meema Ngemi (trs), *Civilization or Barbarism: An Authentic Anthropology*, (3rd ed), (Lawrence Hill Books Publishing 1991), p.212.

63 Supra (n 14), p.85.

64 Kituo cha Sheria http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/; accessed on 19 November 2020.

informed perspective on the foundations for the associated ontological commitments within traditional African culture.[65]

Further, it cannot be gainsaid that legal literacy stands in the way of access to justice even through the formal court systems *ipso facto,* it is incumbent upon all stakeholders in the justice systems to deploy Legal Aid as a tool to enable the disadvantaged segments of the society.

[65] Lee Brown, Understanding and Ontology' in Traditional African Thought in Lee Brown(ed), *African Philosophy New and Traditional Perspectives,* (OUP, Oxford, 2004), p.160.

FACILITATING LEGAL AID THROUGH TRADITIONAL DISPUTE RESOLUTION MECHANISMS: WIDOWS ACCESS JUSTICE THROUGH THE LUO COUNCIL OF ELDERS

Catherine Muyeka Mumma*, Allan Achesa Maleche* and Jessica Achieng' Oluoch*

ABSTRACT

The Constitution of Kenya (CoK) enshrines a rich Bill of rights that is premised on the primary human rights principles of equality and non-discrimination. In Kenya, women remain the most affected by HIV, having a higher prevalence than men. The stigma associated with HIV has resulted in gross violations of human rights for people living with HIV (PLHIV) in general but far worse for women who already suffer social-cultural biases and violations on account of their gender and negative cultural practices. Women living in Kisumu and Homabay Counties are often subjected to the Luo cultural practice of widow inheritance which is applied in a manner that subjects them to health risks and results in gross violations of their rights including the right to human dignity[1], the right to marry on the basis of free consent of the parties[2], freedom and security of the person including protection from violence[3] and from cruel, inhuman or degrading treatment[4], the right to health[5] and the right to property[6]since refusal to submit to the cultural demands has usually resulted in alienation from the family with the dire consequence of losing the family land.[7] For widows with children, these violations extend to their children who then suffer neglect, may not access

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1 Constitution of Kenya (CoK) 2010.

2 ibid, Article 45(2).

3 ibid, Article 29(c).

4 ibid, Article 29(f).

5 ibid, Article 43

6 ibid, Article 68(c)(vi).

7 Working paper on Reconciling culture and human rights; Global commission HIV and the law accessed on 30 April 2021.

their education and the other rights provided in the constitution[8]. Most of the affected women are not in a position to access the courts which are the main tools for facilitating access to justice in Kenya and thus are reinstated back to their homes by elders who work within the cultural structures, in this case the Luo Council of Elders. KELIN has been collaborating with the Luo Council of Elders in the sub counties of Nyakach, Seme, Muhoroni, Nyando, Suba, Rangwe, Dhiwa, Mbita, Rachuonyo and Kabondo to intervene for widows whose inheritance rights are violated. These elders have collectively facilitated access to justice for widows and orphans and restored the property rights of over seven hundred and fourteen (714) widows and orphans. The lessons from the project have guided the development of training curricula on social norms[9] for the protection of women's land rights that are currently being implemented at the regional level in collaboration with other organisations and communities in Uganda, Kenya and Tanzania with the aim of facilitating access to legal aid for vulnerable women experiencing these violations. From the lessons learnt in the implementation of this project, KELIN is one of the partners that has contributed towards the development of the current Alternative Justice Systems policy in Kenya.[10]

Keywords: Access to justice, Luo Council of Elders, Traditional dispute resolution mechanisms, Widows.

INTRODUCTION

This paper discusses the provision of legal aid for facilitating access to justice through cultural dispute resolution mechanisms. Article 159 of the Constitution of Kenya recognizes the role of traditional mechanisms as dispute resolution mechanisms in community "*so long as they are not used in a manner that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law"*[11]. KELIN and other actors have provided legal aid to poor HIV affected Widows and Orphans to access justice through the Luo Council of elders who are the cultural dispute resolution mechanism within the Luo community in Nyanza, Kenya. The paper shares the lived experiences of the affected widows and some of their

8 Constitution of Kenya, Article, 53.

9 http://www.kelinkenya.org/wp-content/uploads/2020/03/Poster_Board_01-11-Oluoch-303_ppt.pdf accessed on 30 April 2021.

10 Engaging elders and widows in the development of the AJS policy based on the outcome of the CSP accessed on 30 April 2021.

11 Constitution of Kenya 2010, Article 159(2) (c).

narration of these experiences. It also shares how the project was designed to facilitate the resolution of the cases and access to justice for these widows through this mechanism. The authors hope to persuade the readers and policy makers of the need to acknowledge the value of traditional dispute mechanisms as key tools for delivering justice-especially for the poor and vulnerable- and the need to invest in these mechanisms and to design the national legal aid program to also integrate facilitation of access to traditional mechanisms for those who can only access justice through this avenue.

The Constitution of Kenya (CoK) has enshrined a rich Bill of Rights that guarantees the protection of many rights for its citizens. The Bill of Rights *is described as being "an integral part of Kenya's democratic state and is the framework for social, economic, and cultural policies"*[12]*.* It has a strong article on the principle of equality and non-discrimination that provides that *"every person is equal before the law and has the right to equal protection and equal benefit of the law."*[13] It has also entrenched the right to access justice and stipulates that "*the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice"*[14]*.*

Chapter 10 of the Constitution focuses on judicial authority and the legal system; it begins with guiding principles for judicial authority, the courts and tribunals which include the principle that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)"[15].— Clause 3 provides that traditional dispute resolution mechanisms shall not be used in a way that *" (a) contravenes the Bill of Rights;(b) is repugnant to justice and morality or (c)is inconsistent with the constitution or any written law".* The Constitution has also provided for the "encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution"[16].

The *Alternative Justice Systems (AJS) Framework Policy* was recently adopted in August 2020 to guide the operational linkage between the formal justice sector actors and the Alternative Dispute Resolution Mechanisms

12 Article 19(1).
13 ibid, Article 27(1).
14 ibid, Article 48.
15 ibid, Article 159(2)(c).
16 ibid, Article 60(1)(g).

including the traditional ones in a bid to begin the journey towards the full implementation by the judiciary of the constitutional principles in Article 159. This policy acknowledges that 90% of Kenyans resolve their disputes through AJS while the formal court system only serves 10% of those who need to access justice. The policy largely presents the action points that the judiciary hopes to effect in the operationalization of the AJS system. The inclusion of provisions on mediation and arbitration in sectoral laws is gaining prominence with time but there is no clear operational guidance on the traditional dispute resolution mechanisms beyond what is in the constitution that is repeated in AJS, namely its subjection to the bill of rights and other provisions of the constitution and written laws.

Whereas the language of the Constitution suggests that all citizens have an equal chance to enjoy the recognized human rights, the practice on the ground reveals a contrary view. The formal structure of the court system in Kenya makes the courts inaccessible to many Kenyans thereby begging the question as to whether everyone has equal rights. What, for instance, does 'justice' mean for those who cannot access the courts due to long distance to the nearest court, lack of financial means to file a case, lack of legal representation, lack of knowledge on the court procedures or even lack of access because the languages of the court? What does justice mean for poor widows in Kisumu, Homabay and other counties in Nyanza who are disinherited after the death of their husbands but have no means to reach the courts for justice?

Traditional structures play a pertinent role in the implementation of customs and traditions of their communities and have power and authority in determining matters in a way that can positively or negatively affect the most vulnerable within these communities. The concept of social justice existed in all African communities during the pre-colonial times. This project sought to leverage upon this concept to facilitate access to justice for the affected widows disinherited due to the practice of forced *widows inheritance* among the Luo. Customary law is recognized in Kenya in personal matters such as marriage and divorce and in certain land matters; but the parameters of the operation are not defined in policy. Consequently, the details of the cultural aspects that come into play on any issue are unclear and vary from community to community. Even in a community they may vary from one family to another.

More often than not, the power of the invisible little aspects of culture usually determines a person's fate with regard to some matters in their community.[17] In the widows' project, legal aid is provided to both the violated ('widows and orphans in this case) and the dispute resolution mechanism (the elders). The intention is to empower the violated with knowledge on their rights and provide skills to confidently present their case to the elders and in the case of the former elder to educate them to understand the constitutional and statutory limitations that must be considered in the application of customary law and cultural norms. In the KELIN cultural structures project, we also took advantage of the fact that the Luo culture, the Succession Act and the Constitution all espouse the widow's right to inherit family property.

This paper will begin with the accounts of the women who have benefited from the project as drawn from our compendium of cases; secondly we will provide a justification as to why traditional justice is the best form of legal aid for the identified communities and the existing partnerships that support the project design; thirdly we answer the identification of *widows* as the key beneficiaries of the project based on the conversations with the women leaders from the region; fourthly we proceed to the conversations with the elders, who are the custodian of culture and who identified aspects of misapplication of this culture among various communities; we then proceed to the legal backing of the project, designing how best it would work and lastly share the key results of the project with a section on the intersectionality of the justice systems.

Women's Narrations that Informed the Design of the Project

LOA, a mother of four, had barely come to terms with the loss of her husband when she was informed that she had to be 'inherited' in line with the Luo culture. To be inherited entailed engaging in sexual intercourse with a brother or cousin or relative of her late husband. She was informed that this cultural ritual is important in cleansing her so she does not bring '*Chira*' (a bad omen) to the family. When LOA refused, she was told to leave the matrimonial home to prevent a taboo from befalling the family. The family termed inheritance as a mandatory customary practice that must be followed. As a nursing mother, she tried to buy more time by asking them to hold on for her to make a decision on the matter. They, however, insisted

[17] Catherine Muyeka Mumma, "Toolkit on Working with Cultural Structures" <https://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf > accessed 30 November 2020.

that the practice had to be conducted immediately to allow her co-wives to engage in the farming activities given it was the planting season. One week later, she woke up to commotions. Her in-laws were demolishing her house and taking away her property. Left without a choice, Lorna moved out of the home, with only her four children (aged between 16 and 7 months).

The 43-year-old mother and her children became homeless and had to live in the market centre for a while. Not so long afterwards, a close friend volunteered to live with her temporarily in 2003 while she was still trying to make peace with her in-laws. She lived with the friend for a period of two years. Fate did not spare her further agony. Her friend was taken ill and unfortunately died before LOA could save enough money to rent a house. LOA was subsequently kicked out from the house by her friend's relatives. They wanted to demolish the house and use the land for other purposes.

Tragedy beckoned at her for the third time in a row and her fear of being destitute was becoming a reality. Fortunately, the church then came to her rescue in 2005 when they donated some cash for her to rent a house at Pala market, in Kendu Bay, Homa Bay County. LOA and her four children have been living at Pala market ever since where she sells onions tomatoes and vegetables.

> "*Living at the market centre has its challenges; like getting enough money to pay rent, having to buy water for my family to use, and getting enough money to pay school fees. The fact that I have twin daughters makes it even harder since their security is not guaranteed,"* LAO recalls.

She heard about KELIN in 2015 through the Rachuonyo KELIN widows' support group meeting, where she was then connected with the elders from that region to assist with her case.

The case of EAO brings to light another perspective of widows facing challenges to access legal aid and consequently justice. EAO was married under the Luo customary law. She was the third wife and her husband died before building her a house in the rural home as customarily required. She was until his death living with him in a rented cottage. She could not continue living there as she had no means of paying rent. When her husband died, she went to her matrimonial home in Kabondo and informed her in-laws that she would use her portion of land which had been allocated to her by her husband to build a house and live with her children. The in-laws and her co-wives protested. They claimed that it was another of the co-

wives' sons who was the rightful owner of the said piece of land. He was the only male in the family and thus a sole heir as per the customs. They also chased her from the home claiming she was responsible for her husband's death as she was HIV positive. According to them, allowing her to stay in the home was a taboo. With nowhere to go, she stayed with a friend for a while but later rented a house at the nearest market. She could barely afford to pay for the rent and take care of her children. Her friend introduced her to a widows' group so that she could engage in income generating activities. It is from this group that she heard about KELIN since most of the members were widow beneficiaries.

LAO a widow aged 33 years was married under Luo customary law with three children. When her husband died in 2003, her in-laws insisted that she should be inherited by one of her brother's in-law. When she declined she was chased from her matrimonial home in Nyakach and all her property subsequently taken away from her. She made several attempts to reconcile with her in-laws but they were adamant. She rented a house at the nearby market and sold groceries to provide for her children. She also joined a local widow group where she met a KELIN beneficiary. After hearing her story, the KELIN beneficiary advised her to approach the local elders for assistance. The elders set a date for her and her in-laws to meet at the matrimonial home for the determination of the matter.

JAO was married under Luo customary law. She lived with her husband at Kapsabet until his death when she had to move back to her matrimonial home. She found that her house had been destroyed and the land sold to a third party. On inquiry, her in-laws claimed that the land was family land. After her husband died, it was taken over by her brother in-law who in turn sold it in his own right. She had a copy of the title deed and subsequently did a search on the land. She confirmed that it was duly registered in her late husband's name. She informed the brother in-law that he had unlawfully sold her land and she had intentions of obtaining ownership of the land, this angered her brother in-law. He ganged up with the family to chase her from the home. They also accused her of killing her husband since she was HIV positive. She considered going to court but she did not want to cause further strain to her relationship with her in-laws. She approached an advocate for advice and he informed her of KELIN. He was a KELIN's *pro bono* lawyer and thus was familiar with the process. She was referred to a KELIN field officer who in turn liaised with one of the elders in her region.

AAO was married under the Luo customary law. When her husband died in 2011 her in-laws burned down her house in Muhoroni. They informed her that she would no longer stay in the home because she caused her husbands' death due to her HIV positive status. They also took away all her late husband's property. She rented a house at a nearby market place where she sold groceries to provide for her children. She also joined a widow group which engaged in income generating and savings plans for widows. It is in this group that she heard about KELIN since most of the members were beneficiaries. She approached the Muhoroni elders who followed up on her matter.

As highlighted by the few examples shared above, the over 714 widows that KELIN has worked with bring to light the challenges many other widows face in Kisumu and Homabay counties and the larger Nyanza region as they remain alienated when it comes to the full enjoyment of human rights in all sectors. They are, for instance the most affected by HIV, having a higher prevalence than men. The HIV status attracts stigma and discrimination that has always tagged or attracted a myriad of other human rights violations including the disinheritance of widows' properties. That more women are affected by HIV than men is not a scientific finding but rather a perception resulting from the impact of the gender discrimination that women suffer in Kenyan communities. It is critical to secure women's rights to property and inheritance, especially those living with HIV, as this is the entry point for securing their basic rights including the right to health, food and nutrition,[18] social inclusion, poverty reduction and economic development and the rights of their orphaned children to access other rights as secured by the constitution for children.[19] The right to inherit property defines a woman's access to a home and the security it brings; it therefore reduces their vulnerability while enabling them to better support their families**.**[20]

Widows such as the ones whose stories are highlighted above are economically poor have no means to access formal justice in the Kenyan courts given its current structure and even where they do have the opportunity as narrated by JAO, they shy away from a legal contest with their in-laws. The framing and conceptualization of legal aid in cases of

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18 Article,43 of CoK 2010.

19 Article, 53 of CoK 2010.

20 Allan Maleche *, 'Improving Access* to *Justice* and *Land Rights* for *Women Living* with *HIV'* <http://www.focusonland.com/fola/en/for-comment/improving-access-to-justice-and-land-rights-for-women-living-with-hiv/ > accessed 30 November 2020.

such women has to be offered within their contextual environment and fine-tuned to their needs and circumstances.

It is on the basis of the experiences of these women that KELIN designed a legal aid process that would help address the challenges of the widows. Some of the difficulties faced by the widows included; the fact that the physical location of courts and lawyers is beyond the reach of most Kenyans' who are situated in rural areas; one needs financial resources to pay court fees and legal fees where they are represented. Most widows and orphans cannot afford this; the Legal Aid services have largely been an initiative of civil society organizations who have managed to represent many poor people but have only reached very few of those that need this assistance; most legal aid programmes are situated in urban areas and are therefore not accessible to many people in rural areas; the lengthy court processes can run to 6 or more years are discouraging and have led to many poor litigants giving up on their rights since the justice is so delayed as to be functionally useless to them; women whose property is illegally appropriated will often have migrated from the area in question to some informal settlement in big towns and cities by the time the case is finalized. The adversarial nature of the litigation process also makes many women give up their rights since the enforcement of court decisions is sometimes frustrated by relatives who consider the act of "taking relatives to court" as an act of war and those who pursue their family rights in courts are considered to be enemies. The women are likely to be ostracized and exposed to violence. Many women will therefore not consider the option of filing suits against those that violate their rights.

Legal Aid: Why Traditional Justice Systems?

As indicated earlier, the 'Widows' project was conceived in 2004 by KNCHR after the realization by one of the authors of this paper[21] that there were many cases of disinheritance of HIV affected widows in Nyanza once their husbands died. A conversation with these widows, through their widow support groups revealed their helplessness with regard to accessing justice in the courts for being violated by their in-laws. Most of the widows were still young and were struggling to make ends meet. Many had been sent away for refusing to be 'sexually inherited'[22] and had been isolated with their

[21] Catherine M. Mumma who was then a commissioner with the KNCHR.

[22] As will be seen in a later part, wife inheritance served a positive social- cultural function of caring for widows and their families and was not merely a sexual act.

children for failure to comply with culture. Most lived behind shops in rented places or abandoned buildings in the local market places. Their primary focus was to find food for their children; they did not know where to seek for justice. Other members of their husbands' families had also allowed the violations by failing to intervene; in some cases, some of the older members of the families like the mothers' in-law and uncles to their husbands who are expected to protect them had also condoned the cruel acts. Given their poor status, they elected to focus on survival rather than think about the elusive option of seeking justice. Had they even elected to seek justice in the courts, they would have had to travel to Kisumu to seek it from FIDA Kenya; and this would have involved a cost they could barely afford.

So, what would justice look like for vulnerable people such as these widows? What happens to those who cannot access the courts? It is now commonly known that many poor people cannot access justice through the courts because of the financial costs that include court fees, lawyers' fees, commuting costs among and other administrative costs. Even where one might access legal aid for representation (usually through legal aid organisations or *pro bono* lawyers) the widows in Homabay, Nyakach, Muhoroni and the other regions would need to travel to Kisumu to access legal aid services from FIDA-Kenya offices in Kisumu, which is the nearest legal aid service for these widows. Beyond the legal costs, court processes are also quite lengthy with cases usually taking years before they are resolved. This does not provide a solution to a poor widow who needs a quick resolution to her case to restore her and her children's dignity and livelihoods. The adversarial court systems that tend to have 'winner' and 'loser' verdicts are also not suitable for disputes that involve family members. For a widow who has already been frustrated and threatened, an adversarial process may very well increase the levels of hostility against her thereby exposing her to levels of insecurity that may result to harm to her and her children. Finally, courts sometimes focus on technicalities thereby dismissing a case without considering its merits. Courts may therefore not be the best avenue for facilitating access to justice for widows in the above explained circumstances. The use of negotiations and reconciliation may be more useful compared to the court system.

It could also be accomplished without any sexual relations between the inheritor and the widow. This is important in the wake of HIV.

Luo Women Leaders Hear the Widows

After listening to harrowing cases of widows, the KNCHR discussed the matter and agreed on seeking justice for these widows within their communities. Considering the sensitivity of cultural matters, and noting that the widows had all been disinherited in the name of Luo culture, KNCHR decided to invite key influential women leaders from the Luo community to participate in consultations with these widows in their different support groups to hear their cases and assist in determining the veracity of the claims that were being made about the Luo culture. In collaboration with the Kenya Women Political Caucus, a number of women leaders including Hon. Dr. Phoebe Asiyo (former Member of Parliament and the largest women's organisations- Maendeleo ya Wanawake), Dr. Penina Ogada (former Lecturer at the University of Nairobi), The Late Asenath Odaga (Author), and Dorothy Nyong'o (leading communications professional) among others were invited to participate in consultations with widow support groups across different locations in Kisumu, Homabay and Siaya. Also present were members from the KNCHR (coordinating the project), the Policy Project Programme of USAID among others. The women simply narrated their experiences to invited guests on day one and the leaders met on the second day to discuss what they had heard and how they thought these cases could be resolved. Following the report back session, the women leaders in Nyanza agreed that the widows' rights had been violated in the name of culture. In their view, Luo culture was being distorted to serve the selfish interest of land grabbing by in-laws. They agreed with KNCHR on the need to have a conversation with the Luo structure that has authority over culture- 'the Luo Council of Elders.'[23]

The Luo Elders and Leaders Explain the Culture

The KNCHR then, in collaboration with the women leaders from Nyanza, organized a community dialogue with community leaders including Luo Council of Elders (under the leadership of *Ker* Riaga Ogalo), the Hon. Raila Odinga (The political leader of the Luo community-then Minister for Public Works), Prof. Bethwel Ogot (lead Kenyan Historian and author on the Luo

[23] The Luo Council of elders is the body that has authority over matters relating to Luo culture and its customs. Members of the Council are elected by each of the Luo Clans to represent it. Its leader is known as the *Ker* and he is elected leader by the members. The Luo Council of elders also has some political power and it has been known to make political statements on behalf of the Luo Community.

community then Professor of History at the University of Nairobi), the late Professor Okoth Ogendo (leading Constitutional lawyer in Kenya- then Professor of Law at the University of Nairobi) Hon. Prof. Peter Anyang' Nyong'o (then Minister for Planning Development) among many professionals. This dialogue discussed the place of widows in the Luo community and their rights, if any, to inherit property. The subject of wife inheritance and its role in legitimization of widows and their right to inherit was also discussed. The leaders affirmed that Luo culture protects the rights of widows and orphans to the property of their late husband and it also protects widows from violations. They also confirmed that the culture on widow inheritance had the objective of caring for widows and their children and was not merely about sexual activity. That in the wake of HIV, widow inheritance is not a must and even where it is practiced, it can be done without the need for sexual violation of widows. They explained that an old woman beyond child-bearing age is usually inherited through acts that are not sexual. This may be done through wearing the coat of the inheriting member of family and then returning it or through the removal of a piece of the roof and replacing it with another.

Following the discussions, some of the widows were given an opportunity to present the facts of their cases before the meeting and leaders expressed outrage at the manner in which they had been treated. They condemned the treatment that the widows had faced and blamed it on greed by in-laws who were out to grab the widows' property contrary to Luo culture. The KNCHR then requested the leaders especially the elders to use their authority as cultural leaders to obtain justice for the violated widows. The *Ker* and the elders then consulted on the side and resolved to assign any cases brought to their attention to elders from places where the affected widows came from seeking intervention.

Providing Legal Aid to Widows and the Elders

The Legal Aid Act 2016 defines legal aid to include legal advice, legal representation, assistance in resolving disputes by alternative dispute resolution, drafting of relevant documents and affecting service incidental to any legal proceedings; and reaching or giving effect to any out-of-court settlement; creating awareness through provision of legal information and law related education and recommending law reform as well as undertaking advocacy work on behalf of the community. [24] The Act has established a

[24] Legal Aid Act Section 2.

National legal Aid Service[25] as an institution to, among other things, 'encourage and facilitate the settlement of disputes through alternative dispute resolution and to undertake research on access to justice for the indigent and marginalized.' The Act defines "alternative dispute resolution" to mean settling a dispute by means other than through the court process and includes negotiation, mediation, arbitration, conciliation and the use of informal mechanisms even though this Act has not provided any guidance on traditional mechanism.

So how is legal aid provided to ensure access to justice through traditional dispute resolution mechanisms? The widows' project first facilitated dialogues among influential members of the community including cultural or traditional leaders to ensure a common understanding on the kind of violations those widows are facing. The discussion was also intended to allow the community to own the problem and design a just remedy for it given that culture had been used to justify the violations. The dialogue facilitated a consensus among community leaders on the level of protection that the Luo culture accorded to widows in respect of their inheritance and property rights. This consensus led to a commitment by the elders that they would constitute panels of elders to hear every case that would be reported to them. They agreed that elders from the clans where the widows were married would be selected to mediate between the widows and their in-laws in search for amicable solutions. It was also agreed that no elder from the families of the affected widows would be involved in any case involving their relatives.

Project Design and Implementation

The design of the Cultural Structures Program was premised on the fact that there once existed dispute resolution mechanisms in every community. As such, the project purposed to ensure the recognition of the role of Cultural Structures in solving disputes by re-engineering and reconstructing community-based courts and Barazas on conditionality that the process respects the human rights applicable to Kenya and later as stipulated under the Constitution of Kenya 2010.

The project was implemented through a mix of methods that involved community conversations with HIV widow support groups which revealed the rampant disinheritance of widows and orphans affected by HIV and their

[25] Legal Aid Act Section 5.

inability to access justice for lack of the means necessary to access the courts or the few legal aid mechanisms in Kenya.

As apparent from the few examples cited, common to excuses for disinheritance were real and manufactured cultural practices. Given the close physical proximity of elders within communities, the project drivers decided to initiate conversations with elders and community leaders with a view to interesting the elders in re-constructing community dispute resolution spaces where widows can easily reach and prosecute their cases. The conversation with elders led to the establishment of elders' dispute resolution panels in different communities that would intervene in cases where widows were disinherited.

Legal aid was then provided in two ways: first, the panels were trained on the provisions of the Kenyan Constitution, laws on human rights and family and property rights with a view to ensuring that the application of Luo customary law and applicable the cultural rights did not violate any formal right or law. In the second instance, widows and the community-based organisations (CBOs) and widow support groups were also sensitized and trained on the same laws and how to recognize violations and report them for intervention by the elders. The CBOs mobilized affected widows and brought them together for training on their rights and ways of confidently presenting their cases before elders. Many of the cases of disinherited widows were referred to the elders' panels where their cases were successfully prosecuted.

The elders, who are members of the cultural structures are referred to as custodians of culture and thus play a major role in preservation of the culture and widely respected among the community. Where dispute resolution takes the form of a community court, it is presided over by respected elders in the community who are expected to maintain a degree of impartiality. The resolution of disputes involves holding separate meetings with parties at a convenient location but the joint meeting with all parties is conducted at the matrimonial home. The length of the dispute resolution process usually depends on the complexity of the issue but usually takes a maximum of three weeks and a minimum of three days.

Below is a graphical representation of the key interventions for the Cultural Structures Project that contributed to giving a holistic aspect of providing legal aid to the vulnerable widows.

The Cultural Structures project demonstrates an effective approach where culture and cultural processes are harnessed to resolve disputes in a manner that promotes human rights while disregarding those aspects of traditional culture that are inconsistent with human rights and which contribute to HIV risk and vulnerability. The approach has succeeded in identifying positive aspects of Luo culture that can be used to strengthen

community's ability to claim their legal rights to own and inherit lands. It is a clear option for facilitating access to justice for those who cannot reach the courts.

Key Results and Lessons Learnt

The system of working with elders is favoured at the community level for a number of reasons including: the fact that the physical location of courts and lawyers are beyond the reach of most Kenyans who are situated in rural areas; one needs financial resources to pay court fees and legal fees where they are represented; most legal aid programmes are situated in urban areas and are therefore inaccessible to many people in rural areas, and the fact that lengthy court processes that can run to 6 or more years are discouraging and have led to many poor litigants giving up on their rights.

We have thus over the decade registered results through the project including over 730 cases have been resolved under the Cultural Structures Project and elders continue to engage in weekly mediations in an effort to promote women's access to property rights; Over 30 widow champions are engaged in the identification and referral of cases within the sub counties of Kisumu and Homabay; Over 35 widows have been supported to conduct succession on their property and obtained letters of administration, grants and even title deeds to their rightful property thus preempting future violations; Over 100 male and female elders have been trained on a rights-based approach to land and property rights; Over 500 women within their support groups have undergone training on claiming their rights within the cultural structures; A Compendium of cases has been developed that briefly documents the facts of the case and the basis of the decision by the elders; Over 10 elders have been admitted as formal members of the Court Users Committees at the sub county and county levels to represent the voice of actors of justice under traditional and cultural systems and finally, We are working closely with Court Users Committees in Kisumu, Homabay and Nairobi where we sit in in the committees for purposes of representing civil society organizations that engage in third party annexed mediations as per the Alternative Justice Systems Policy 2020.

The use of cultural structures as an alternative dispute resolution method option has facilitated the enjoyment of the right to property by widows and orphans. It is faster, efficient, less expensive and less adversarial compared to formal systems. It ensures a more sensitized community on human rights

issues and is therefore both educative and deterrent to violations even as it restores justice.

The major project weakness is sustainability since the elders engaged in the process are usually 50 years and above and there are usually high attrition rates among this cohort which means that continuously new elders have to be trained and engaged. With shortage of funding, continuous training by CSO might not be sustainable. There is need for the Judiciary and other partners to complement the efforts of CSOs and provide support.

Intersectionality and Interdependence of Formal and Informal Structures

Currently, there are no direct lines of cooperation between the traditional and the formal justice system. Most of the structures have however established linkages with several agencies that oil the wheels of the formal justice system. There has been established the Court Users Committees at the sub-county level whose mandate is to ensure that access to justice is *pro poor*. Elders within the traditional justice system are included as members of the committees in various sub counties with the recognition that over 99% of cases at the community level are usually resolved by the traditional justice systems. The engagement does not necessarily result to formal engagement but goes to demonstrate the need for complimentary efforts within the two justice systems.

The elders cooperate with the police especially when there is a threat to a woman's life, or in instances where a woman has been hurt. In such cases, they assist complainants to make reports to the police and follow up to ensure that cases are heard to completion. Cooperation with police is also important as it ensures the protection of accused persons from irate mobs where there has been violence related to inheritance cases.

Elders are often called upon to give evidence in cases of inheritance and those that require customary law interpretation. In certain instances, the parties are referred to the elders at the community level for dispute resolution which decision is then adopted by the court. This demonstrates that the legal aid process is not limited even when matters have been referred to formal courts.

Most of the elders are not trained in any form of law or justice. They rely on the goodwill of the organizations that train them such as KELIN. Considering

the role, they play in legal aid at the community level, there is need for investments by partners such as the Judiciary who refer matters to them since there is need for understanding of both the legal and cultural perspective to ensure that the decisions reached adhere to the constitutional specifications on the applicability of customary law.[26]

CONCLUSION AND RECOMMENDATIONS

Given the structure of the judicial system in Kenya and its alienation from majority of citizens; deliberate efforts need to be made to re-imagine a system where all, including the poor can truly understand what the right to access justice means. This paper has argued that traditional justice mechanisms can protect the rights of the vulnerable and poor who cannot access justice through the formal courts. It has made a case on the need for the implementation of Article 159(2) (c) of the Constitution to facilitate access to justice by the poor and vulnerable.

Therefore, there should be more investment in cultural structures as an avenue for legal aid in its own stature without reliance on formal structures which most Kenyans have no access to because of costs and other inhibitions. The process has been mostly voluntary by elders and heavy investments by the civil society organizations which rely on donor funding. Only then can we make this avenue self-sustainable and accessible to the common *mwananchi* who face violations at the community level.

To better align the work of the traditional justice systems with the Constitution, there is need for more training on the Constitution especially on the Bill of Rights and how it relates with the work that they do. The elders would also benefit from training on all the other aspects of the Constitution, including the Chapter on land, for an understanding of this fundamental document on which their work must be invariably be based to bring into effect Article 159 (2) (c) and (3) of the Constitution.

There is also need for legal training to enable elders align their work with civil and criminal procedures if they are to be integrated into the formal justice mechanisms. This would enable them take on the evidence necessary to ensure the protection of the rights of women to inheritance.

[26] CoK 2010 Article 2(4).

In formalizing the traditional justice systems, there would be need to standardize the processes including communication. The fact that elders come from various spaces even within the same communities makes the communication difficult.

Previously, the lack of recorded proceedings has been a challenge in follow up of the cases to ensure that the decisions of the elders are adhered to. The elders now record the proceedings and have the parties sign the agreements or decisions. The elders also ensure that the proceedings are typed and these have been used in inheritance cases that have proceeded to the formal justice system. The typing is however happening around localized arrangements that are not sustainable.

More efforts need to be made to ensure that elders document their cases in a way that can be adopted in the formal courts in line with the provisions of the Constitution. There is need to ensure that the government, through the Kenyan judiciary, institutionalizes the work of the elders in order to realize the constitutional provisions for the promotion of alternative forms of dispute resolution including traditional mechanisms. The traditional justice systems would benefit from financial support for recruitment of support staff to facilitate their work.

Monitoring the work of the traditional justice mechanisms and the extent to which they coordinate with one another is also not clear and not standardized.

The monitoring and standardization of the work of the traditional justice systems would benefit from joint trainings of elders and judicial staff, exchange visits among elders and comparative studies with organizations and countries that have used traditional justice mechanisms.

Operationalizing Alternative Justice System through Grassroots National Government Administrative Structures: A Case of Nakuru North Sub-County

Mary Mwangi*

ABSTRACT

Access to justice is critical to the development of a society. In Kenya, access to justice for all Kenyans is emphasized in the Constitution. However, majority of Kenyans find it difficult to access justice due to high cost and time involved in disposing cases through the formal justice system. As a result, a debate on the use of alternative systems of dispensing justice has emerged but no tangible structures have been created to support this idea. This paper explores the effectiveness of grassroots National Government Administrative structures comprising of Chiefs, Assistant Chiefs and elders and the role they play in delivering alternative justice and the challenges that they encounter. Results showed that these structures are already involved in resolving disputes and are deeply entrenched within the community. The average time for disposing cases at the grassroots administrative structures is 5.8 days, which is significantly shorter than the average of 24 months that it takes to resolve dispute in formal judicial system. The average direct cost of resolving disputes is approximately Kshs.500 which is substantially lower than the average cost of resolving dispute through the formal court system, which is estimated to be between Kshs.6000 to Kshs.30,000. The resolution process is also characterised by flexible mechanism for summoning parties, flexible procedures for presenting cases, and less punitive remedies. The challenges that hamper the effectiveness of dispute resolution by these structures include lack of adequate training on dispute resolution, interference in the dispute resolution process, lack of adequate resources, and lack of cooperation. To enhance the effectiveness of these structures in resolving disputes, the government needs to provide trainings to the

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administrators and allocate more resources towards the dispute resolution function.

Keywords: Alternative justice system, grassroots administrative structures, chief, mediation, alternative dispute resolution.

INTRODUCTION

Access to justice is a basic principle of the rule of law. However, accessing justice is still a challenge in Kenya. A survey conducted by HiiL Innovating Justice in 2017 revealed that more than 50% of respondents had experienced extreme stress and mental health problems due to legal challenges[1]. Poor access to Justice in Kenya is largely attributed to low number of magistrates and judges. In addition, citizen's access to justice has been hampered by the need to travel long distances to access the courts, complex court processes that make legal representation a necessity, and the high cost of accessing legal representation[2].

The drafters of the Constitution of Kenya 2010 noted the limitation of the formal justice system and highlighted the need to promote alternative justice systems (AJS)[3]. The term alternative justice system (AJS) refers to structures for administering justice that can be used in place of the mainstream judicial system.[4] AJS make use of customary law, culture, practices and beliefs to resolve disputes. It emphasizes on restorative justice that seeks to provide an expeditious, participatory, affordable, and socially inclusive modes of resolving disputes[5]. It makes use of alternative mechanisms of resolving

1 HiiL Innovating Justice, 'Justice Needs and Satisfaction in Kenya 2017' (HiiL Innovating Justice 2017) <https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf>accessed on 11 November 2020.

2 World Bank, 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' (*World Bank*, 2017) <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> accessed 11 November 2020.

3 Agnetta Okalo, 'Mainstreaming Alternative Justice Systems for Improved Access to Justice: Lessons for Kenya' (University of Nairobi 2019).

4 Kariuki Muigua, 'Current Status of Alternative Dispute Resolution Justice Systems in Kenya' 36.

5 Okalo (n 3).

disputes such as mediation, arbitration, conciliation, negotiation, and expert opinion.[6]

The AJS Baseline policy identifies grassroots national government administrative structures as one of the avenues that the country can use to operationalize AJS in Kenya[7]. The National Government Administrative Structure is established through the National Government Coordination Act of 2013.[8] As Figure 1 illustrates, the National Government Administrative Structure comprises of five hierarchical positions with the senior-most being the County Commissioner and the junior-most being the Assistant Chief. Later, a position of the Regional Commissioner was created who supervises counties that replaced the former Provincial Administration. In this paper, the term grassroots national administrative structure refers to the Chief and Assistant Chiefs as well as other arrangements that have been established to assist the two offices in the execution of their mandate.

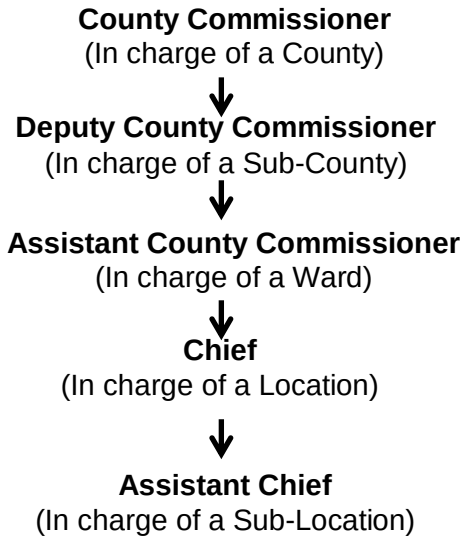

Figure 1: National Government Administrative Structure

6 Kariuki Muigua and Francis Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' [2015]: 1 Strathmore Law Journal.

7 The Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' <https://ajskenya.or.ke/download/alternative-justice-systems-baseline-policy/>. Accessed on 12 May 2021.

8 National Government Coordination Act No.1 of 2013.

The Chief's Act[9] stipulates that the primary duty of Chiefs and Assistant Chiefs is to maintain order in their area of jurisdiction. The Act also allows these officers to appoint other persons to assist them to carry out their duties. Resolving disputes is a not a strange task for grassroots administrative officers. In fact, dispute resolutions make up the bulk of the tasks that Chiefs and Assistant Chiefs perform in the day-to-day activities. The survey by HiiL Innovating Justice revealed that Chiefs and their Assistants are the most helpful in delivering justice to the poor and rural population[10]. This paper sought to determine whether the grassroots administrative structures form effective avenues for delivering alternative justice and challenges that these structures encounter.

METHODOLOGY

The study utilized the descriptive research design because the aim of the study was to describe the dispute resolution processes at the grassroots administrative structures and challenges encountered during these processes. The study was conducted in Nakuru North Sub-County, which was purposively selected because of proactiveness of the grassroots administrative structures in the area in the resolution of disputes. The target population comprised of chiefs, assistant chiefs, and disputants who had their disputes resolved at the grassroots administrative offices in the 1-week period prior to the date of study. The study area had a total of 39 administrators (10 Chiefs and 29 Assistant Chiefs) during the period of study. In the 1-week period prior to the date of study, a total of 89 disputes had been resolved involving 195 disputants through the offices of the 39 grassroots administrators. Participation was voluntary where those who were approached were given the option to decide whether to participate or not. Data was collected using semi-structured questionnaires. Two questionnaires were constructed one targeting the administrators and the other targeting the disputants. The resultant data was analysed using descriptive statistics such as frequencies and percentages and the thematic content analysis technique. The analysis was aided by the Statistical Packages for Social Sciences (SPSS).

9 Section 6 of the Chief's Act, Cap 128, Revised 2012.
10 HiiL Innovating Justice (n 1).

Analysis of AJS at the Grassroots

A total of 24 administrators, equivalent to 61.5% of the population of administrators, participated in the study by completing and returning their questionnaire. The majority of these administrators (75.0%) were male with the remaining 25.0% being female. The average age of the administrators was 47.6 years with the youngest being 40 years and the oldest being 54 years old. On the other hand, 23 disputants equivalent to 11.8% of the population of the disputants completed the study. The majority of the disputants (69.6%) were male with female accounting for 30.4% of the sample. Their mean age was 41.7 years with the youngest being 20 years and the oldest being 72 years.

The respondents were involved in resolving different forms of disputes. Marital disputes were the most common with 47.8% of the disputants reporting this form of dispute. Marital dispute encompassed issues such as squabbles among married couples, extra marital affairs, and up-keep for children of separated couples. Marital disputes are prevalent not just in Kenya but in most parts of the world[11]. If not resolved in time, these conflicts lead to physical and psychological abuse[12]. Njoroge also observed that most marital disputes in Kenya are solvable but without structured approaches of resolving them, couples end up separating[13].

The second most common dispute was debt, which was reported by 21.7% of the surveyed disputants. Debt dispute covered a wide range of issues including a party failing to repay money that was lend to him/ her or a tenant failing pay rent for several months. Land dispute was reported by 17.4% of the disputants and encompassed issues such as disagreement about land boundaries, land sale, and land inheritance/ succession. Land issues are very emotive in Kenya because land is considered a valuable resource by virtually all communities and is an important factor of production[14]. Therefore, having

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11 Elijah Onyango Standslause Odhiambo and Thomas Leshan Maito, 'Social Dimensions of Marital Conflict in Kenya' (2013) 1 Journal of Power 12.

12 ibid.

13 Sarah Njoroge, 'The Influence of Regulated Marital Conflict Resolution Styles on Marital Stability in Kiambu County, Kenya' (2017) 13 European Scientific Journal 24.

14 Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' [2019] Les Cahiers d'Afrique de l'Est / The East African Review <http://journals.openedition.org/eastafrica/879> accessed 30 November 2020.

effective mechanisms for resolving land disputes is paramount to the peace and stability of the country.

About 8.7% of the disputants said that their case was about theft, where they had gone to report someone whom they believed had stolen their property. Another 4.3% said that their case was about a physical altercation with another party. These finding is also consistent with Muigua who argues that alternative dispute resolution mechanism should be used to resolve petty crimes such as nuisance, theft, and cattle rustling[15].

Effectiveness of the Grassroots Administrative Structure

The study also interrogated the dispute resolution process at the grassroots administrative structures with the aim of determining their effectiveness. Several issues were interrogated including duration of cases, cost to the disputants, procedures involved and fairness of the process.

Duration of Cases

The time taken to resolve cases is one of the indicators used to evaluate the effectiveness of an AJS.[16]In the current study, disputants were asked to indicate how long it had taken to have their dispute resolved in terms of days. Results showed that the disputants' cases took an average of 5.8 days to resolve. Most cases were resolved within a day as shown by the mode statistic in Table 2 while the case with the longest duration took approximately 28 days to resolve.

Table 1: Results on Duration of Disputants' Cases

Statistic	Value (in days)
Mean	5.8
Mode	1
Minimum duration	1
Maximum duration	28

[15] ibid.

[16] Inessa Love, 'Settling Out of Court: How Effective Is Alternative Dispute Resolution?' <https://openknowledge.worldbank.org/bitstream/handle/10986/11055/678050VP00PUBL0Setting0out0of0court.pdf?sequence=1&isAllowed=y>.accessed on 12 May 2021.

These findings were collaborated by the data collected from the administrators with 41.7% of them indicating that most cases take 1 day to complete. However, the administrators explained that the duration of the cases is largely determined by the nature and magnitude of the case. Complicated cases such as land disputes take longer to resolve. The time taken to resolve the dispute is significantly shorter than the average duration of cases in the formal judicial system in Kenya that is estimated to be 24 months.[17]The findings are consistent with the review by Love who found that in California, AJS resolved 25% of cases within six months as compared to 15% resolved by the formal legal system.[18]

Findings of the current study also demonstrated the importance of resolving disputes in the shortest time possible. One of the cases (case 14) involved a tenant who had his house locked by the landlord because he had accumulated rent arrears. The case was heard and determined within 7 days. During the duration of the case, the tenant's house was still locked forcing him to seek refuge from friends. If this case would have dragged on for months, the suffering of the tenant would have been prolonged.

Cost to the Disputants

The study also examined the monetary cost incurred by the disputant to have their case resolved at the grassroots administrative structures. Table 3 indicate that average monetary cost the disputant incurred was about Kshs 500.

Table 2: Cost incurred by the Disputant to have their Cases Resolved

Statistic	Value (in Kshs)
Mean	486.96
Mode	0
Minimum duration	0
Maximum duration	4000

The majority of the respondents reported that they did not pay any fee as indicated by the mode value. This is consistent with the data provided by the administrators, who reported they do not charge any fee. However, some disputants reported that they were asked to pay some fee ranging from Kshs 200 to Kshs 4,000. The fee can be largely explained by the fact that the grassroots administrative offices are not allocated resources to remunerate the elders appointed to help in resolving the cases. Consequently, the

[17] HiiL Innovating Justice (n 1).
[18] Love (n 16).

administrators are compelled to charge some fee in order to remunerate the elders for their time. However, there are no guidelines regarding the amount of fee to be charged.

The average fee paid by disputant at the grassroots administrative structures is however very little compared to the fee that litigants pay when they go through the formal judicial system. According to Muigua, the average cost of opening a file upon retaining the services of an advocate in Kenya is about Kshs. 6000 while the fee including advocate fee may rise to Kshs. 30,000 upon the completion of a simple matter.[19] The literature review by Love established that Americans firms that resolved their disputes through AJS reduce their cost of dispute resolution by 3 to 50 percent. The current study only compared the direct cost involved in resolving disputes in the formal justice system versus the grassroots administrative structure. The difference in the cost of the two avenues of justice widens further in favour of the grassroots administrative structures when indirect cost such as the cost of traveling to the case venue and production time lost during attendance of case hearings are considered.

Procedures involved in Resolving Disputes

The study further interrogated the procedures involved in resolving disputes at the grassroots administrative structure. Findings revealed that once a dispute is reported to the administrators' office, the administrator writes a letter summoning all the parties involved in the dispute indicating the date and time that they should present themselves at the administrator's office. There are no major technicalities involved in reporting of cases; the complainant just explains his or her issue to the chief who determines whether the case requires a hearing. This is a stark contrast to the formal judicial processes that require litigants to follow a structured procedure to kick start their case including filing documents and paying court fees. Muigua and Kariuki argue that one of the factors that threaten the rule of law in Kenya is legal formalism and dogmatism including complex court technicalities and procedures.[20] The formalities and technicalities that characterize the Kenya judicial system have pushed justice beyond the reach of many ordinary Kenyans, which has threatened the rule of law.

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[19] Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 26. Available at: <http://kmco.co.ke> accessed 10 November 2020.

[20] Muigua and Kariuki (n 6).

Current findings further revealed that the summon letter issued by the grassroots administrator may be delivered by the complainant or an elder. In some cases, parties are summoned through telephone calls by the chief, which tend to speed up the summoning process. This feature is also a sharp contrast to the judicial summoning process where the summons must be delivered by the complainants. Previously, complainants had to travel long distance to deliver summons to defendants and at times have to find ways of catching up with cunning defendants who avoid being summoned[21]. The administrator then selects a panel of elder that presides over the case. The involvement of elders from the community ensures that local remedies and solutions are integrated into the dispute resolution mechanism. McGinley observed that a major advantage of incorporating indigenous solutions in a dispute resolution process is that it creates a sense of control and ownership in the outcomes[22]. Consequently, the outcomes of the alternative dispute resolution process are easily accepted by all parties. On average, a panel will have about four elders and the administrator. The process of selecting the elders is not structured and often the elders selected are the ones present at the administrator's office during the day of the hearing.

During the hearing, each party is given the opportunity to present his or her side of the story. In some cases such as land dispute, disputants may present written records to support their case. In other cases, such as marital problem or theft, disputants may call witnesses to support their story while in cases involving land boundary disputes; the panel may visit the land in question. After evaluating all the materials presented to them, the panel makes a decision on the way forward. When disputants were asked whether the process involved in resolving their case was well organized, 95.7% gave an affirmative answer indicating that they were satisfied with the organization. The disputants were further probed to give their views regarding the dispute resolution procedures.

Results showed that the disputants were pleased with different aspects of these procedures including the summoning of all parties involved, provision of equal opportunity for parties to present their story, the arrangement of the venue, the manner in which the hearing were conducted, and the availability

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21 Geoff Dancy and others, 'What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya' [2019] Journal of Conflict Resolution.

22 James D McGinley, 'A Soft Solution for a Hard Problem: Using Alternative Dispute Resolution in Post-Conflict Societies' (2016) 16 Pepperdine Dispute Resolution Law Journal 31.

and punctuality of the panellists. These findings are consistent with the study by McGinley who observed that approaching a case in good faith and ensuring that issues are discussed in depth leads to the acceptance of the ultimate solution by all parties[23].

Language Used

The language used during the dispute resolution was also interrogated. This analysis was founded on the premise that one of the factors that make the formal judicial process inaccessible to the majority of Kenyans is the use of technical language and a lot of formalities[24]. In most cases, the largest proportion of communication in the Kenyan formal justice system is done in written form. The technicality of formal court processes and language compel citizens to seek legal representation that adds to the cost of resolving dispute. Drabarz, Kaluzny and Terrett observed that the choice of language determines the efficiency of any justice system in delivering justice to citizens[25]. This study has established that in the grassroots administrative structure, there is a lot of flexibility regarding the language used to resolve disputes.

Proceedings mainly rely on oral presentations by the disputants. Although written documents may at times be adduced, they often serve to support the oral presentations made by the disputants. In most cases, the panel uses the language understood by all parties involved. The Swahili language is the most commonly used language of dispute resolution in the study area, but the panel also allow parties to use local languages to express themselves. Where parties involved only understand a language that is not understood by the panellists and/ or the other parties, the services of an interpreter are sought. Switch of language between Swahili and local dialects is common during cases, which allow open expression of views by the disputants. These findings are consistent with the study by Drabarz, Kaluzny and Terrett who asserts that the language used in dispute resolution process should be

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23 Ibid.

24 Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (n 20) in first National Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Inter-Continental, Nairobi 2018.

25 Anna Drabarz, Tomasz Kaluzny and Stephen Terrett, 'Language as an Instrument for Dispute Resolution in Modern Justice' (2017) 52 Studies in Logic, Grammar and Rhetoric 41.

pragmatic in promoting communication between the disputants and the arbitrators or mediators[26].

Fairness of the Process

The study also sought to know the fairness of the process used to resolve dispute at the grassroots administrative structures. When asked about this issue, majority of the disputants (95.7%) felt that the dispute resolution process was fair. The disputants gave different account to support their position including that all parties were given equal opportunity to present their story, equal treatment of all parties by the panel, and proper listening by the panellists. On the other hand, the administrators explained that the appointment of elders to listen to the cases is one of the mechanisms that they use to ensure fairness. Having different persons listening to the case tend to reduce bias. This is not usually the case in the formal judicial process in Kenya where most cases at the lower courts are heard and determined by a single individual. A panel is only constituted at the Court of Appeal and Supreme Court levels.

Current findings also suggest that satisfaction with case outcome is higher among disputants who resolve their cases through the grassroots administrative structure than those who go through the formal judicial process. These findings are a sharp contrast to the findings of the study by Pryce and Wilson that involved a sample of 519 individuals, which found that the majority of Kenyans are sceptical about the fairness of the formal judicial process[27]. The majority of the respondents expressed that the formal justice system tend to favour the elite and people of high social economic status.

Challenges

The final objective of the study was to understand the challenges that hamper the dispute resolution process at the grassroots administrative structure. Several issues emerged including lack of training, interference, lack of cooperation, threat to the security of the administrators, and lack of resources.

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26 ibid.

27 Daniel K Pryce and George Wilson, 'Police Procedural Justice, Lawyer Procedural Justice, Judge Procedural Justice, and Satisfaction With the Criminal Justice System: Findings From a Neglected Region of the World': [2020] Criminal Justice Policy Review <https://journals.sagepub.com/doi/10.1177/0887403419900230> accessed 30 November 2020.

Training

As illustrated in Figure 2, about 58% of the administrators had not undertaken any formal training on dispute resolution. About 42% elaborated that they had attended short courses or seminars organized by the law courts, local universities, and non-governmental organization. Some administrators reported that the only training that they had received was on conflict resolution, which is one of the units taught when the administrators are taken for the paralegal training upon recruitment. Only two administrators reported to have undertaken professional training on alternative dispute resolution that goes for more than 1 month. This figure translates to 8.3% of the total sample.

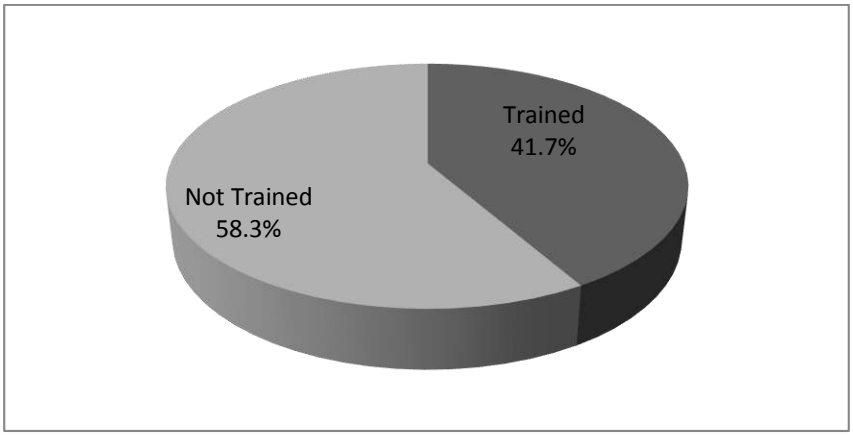

Figure 2: Distribution of Administrator based on Training

McGinley noted that the success of AJS is dependent on the skill, expertise, and knowledge of the personnel who are tasked with the responsibility of dispensing justice[28]. The alternative dispute resolution process requires a blend of sufficient problem-solving skills blended with experience and light footprint[29].The level of skills required rises as the complexity of the dispute being resolved increases. Although the administrators and the elders have gained considerable experience through practice, some skills can only be learnt through formal training. It was worth noting that while the short courses play a role in improving the administrators' dispute resolution skills, more comprehensive training is needed.

Interference

Interference in case proceedings by external forces is another challenge that was identified during the study. The majority of the administrators (58.3%) reported that they experience different forms of interference when resolving

[28] McGinley (n 22).
[29] Ibid.

cases. The most common form of interference comes in the form of intimidation from friends and family of the accused as illustrated in Figure 3. This implies that the security of the administrator is an issue of concern when it comes to dispute resolution especially for sensitive matters. Other sources of intimidation include politicians and lawyers who keep issuing threats to the Administrators disguised as court contempt.

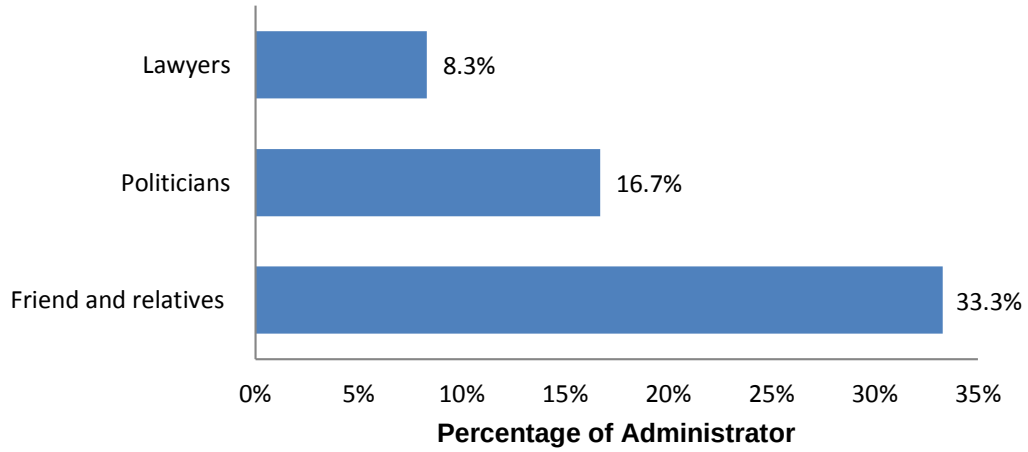

Figure 3: Sources of Intimidation encountered by the Administrators

About 33% of the administrators reported experiencing intimidation from friends and relatives on parties involved in case that they are resolving. About 16.7% said that they have experienced intimidation from local politicians such as members of parliament or members of national assemblies. About 8.3% said that they have experienced intimidation by lawyers who have been engaged by parties involved in a case. Another form of interference is bribery, where one of the parties attempts to bribe the panellists or some of the panellists in order to get a favourable ruling. This implies that the integrity of the elders selected by the administrator is paramount to safeguarding the sanctity of grassroots administrative structures dispute resolution function. The integrity may be undermined by the fact that the Administrators are not allocated a budget for remunerating the elders making them susceptible to bribery.

The issue of interference in AJS particularly those that place emphasis on cultural approaches of resolving disputes was noted in the study by Brown, Cervernak, and Fairman, who found that community mediators and arbitrators often have influence over disputants by virtue of their positions and thus they

may push disputants to accept settlements that they do not agree with[30]. Disputants may also feel pressured by cultural norms to accept settlements that are considered as fair standards in a given community. Cultural norms may also influence the selection of mediators/ arbitrators. For instance, in communities with patriarchal cultures, the mediation/ arbitration team is more likely to be male dominated, which may disadvantage female disputant especially when it comes to resolution of gender sensitive issues such as property inheritance.

The issue of interference in AJS is also acknowledged in the Arbitration Act 2012 which lays ground under which arbitral awards may be set aside by the court[31]. One of these grounds is when there is evidence of corruption and undue influence. The Arbitration Act requires parties to sign an arbitration agreement that stipulate the appointment of arbitration procedures including the selection of the arbitration panel[32]. This feature is not present in the grassroots administration structures as the mediation/ arbitration panel is selected by the chief or assistant chief, which exposes the process to interference and undue influence.

Lack of Resources

The dispute resolution process is also hampered by lack of adequate resources. The study has established that the grassroots administrators rely on the services provided by community elders to resolve cases. However, their offices are not allocated resources for remunerating and facilitating these elders in the execution of the dispute resolution duties. As a result, some administrators require disputants to pay some fee to have their cases resolved. Although the study has established that the fee is low when compared to the cost of formal litigation, it may lock out the very poor from accessing justice through the local structures. Limited resources also make the elders susceptible to bribery and influence. It may also limit the quality of the dispute resolution process by limiting the fact-finding capabilities of the panellists. It has been established that in disputes related to land, the panellists are at times compelled to visit the site so as to gain a better understanding of the dispute. Such endeavours require resources that have not been provided for by the government.

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30 Scott Brown, Christine Cervenak and David Fairman, 'Alternative Dispute Resolution Practitioners Guide' (USAID 2016) <https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf> accessed 10 November 2020.

31 Section 35 of the Arbitration Act CAP 49, Revised 2012.

32 Section 3 of Arbitration Act.

CONCLUSIONS AND RECOMMENDATIONS

Based on the findings, the study concludes that the national government grassroots administrative structure offer a viable means of providing access to alternative form of justice to citizens. The study has established that these structures are already widely used to resolve family and civil issues as well as petty crimes in most parts of the country. The merit of these structures include shorter duration of cases, lower cost of resolving dispute, greater transparency and perceived fairness, and use of restorative remedies. However, the study has established that the effectiveness of grassroots administrative structure dispute resolution function is hampered by lack of training, interference, lack of a legal framework, lack of resources, and lack of cooperation. Based on the findings, the study makes the following recommendations that may enhance the effectiveness of the grassroots administrative structures in delivering alternative justice.

Training for the Grassroots Administrators

Government should provide training to the administrators on key areas such as mediation and arbitration among others. For the training to be more effective, it should be tailored to specific issues that the grassroots administrators deal with such as marital disputes, debts, land disputes, and petty crimes. Training can best be achieved through provision of trained facilitators to implement the training programme at the grassroots levels. The government can also facilitate professional training to the administrators, who after accreditation by relevant bodies would in turn act as trainers to the elders.

Adequate Resources to Facilitate Dispute Resolution

The government through the Ministry of Interior should provide adequate resources to the grassroots administrative offices for resolving disputes. In particular, the government should allocate a budget for remunerating the elders, facilitating fact-finding missions and enforcing decisions. Amount of resources allocated to a given administrative unit should match the type and volume of disputes addressed in the area. Areas with numerous and complex disputes should be given more resources to facilitate resolution of the disputes. Remuneration for elders will be a vital mechanism for reducing bribery and undue influence.

Guidelines to Standardize Service Fee

If government cannot provide resources to facilitate dispute resolution, a guideline should be developed that stipulate fees that disputants presenting different types of cases should pay as a service fee. Current findings suggest that the grassroots administrative offices in some area are already charging fee on disputant informally. This can be standardized so as to eliminate room for exploitation.

Recognition and Enforcement of Decisions

The formal justice system should recognize and enforce the decisions made by the grassroots administrative structures on disputes. This recognition will enhance the authority of these structures in resolving disputes. It will give the grassroots players' greater legitimacy in the eyes of the public and; thus, increase the number of Kenyans willing to resolve their disputes through this channel.

The Potential of Traditional Justice Systems in Enhancing Access to Child-Friendly Justice

Janette Nyaga*

ABSTRACT

Although the constitution of Kenya 2010 and other international human rights instruments provide for the right of access to justice, the same remain unattained for the most part especially among vulnerable groups. Children represent one of the groups which experience the highest number of human rights violations. Despite legislative and other policy attempts to secure children's access to justice, many children do not report violations partly because their violators are usually their immediate guardians. The formal justice system fails to provide adequate safeguards to protect children from victimization should they report any violation by their guradians. Similarly, the formal justice system does provide sufficient redress for children in conflict with the law are also exposed to harsh penal systems that lack sufficient child sensitive procedures. Such systems increase their propensity to commit crimes in the future as opposed to the intended deterrent effect.

As one of the vulnerable groups in society, children encounter various hurdles in their quest to access justice within the formal justice system. In particular, many children: lack the requisite knowledge and resources to pursue a legal claim; lack legal capacity to initiate legal proceedings on their own; face financial constrints; suffer from language constraints; have to travel long distances to access formal justice institutions; fear ostracism by going to court; some find the formal justice system harsh and undesirable; do not see themselves victims; face heightened risk of stigmatization and retaliation; face the risk of institutionalization in the formal justice system; face pressure from failies to settle disputes out of court; and the fact that family support is essential to the successful participation of children in the justice system-all mean that the formal justice sytem is not well suited for processing disputes involving children thus hampering their access to justice.

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This state of affairs impels the need of exploring alternatice justice system that can potentially provide child friendly justice procedure. Traditional justice systems, which are recognized under article 159 of the constitution of 2010, are closer to people and do not have the stringent formalities that are found in the formal justice system and therefore, potentially provide a friendly avenue for children to access justice. Traditional justice system could cure these chllenges by resolving dipsutes in a relatively shorter time and diverting children away from the harsh formal justice system. These systems are also significantly cheaper, more accessible, and less complicated than the formal justice system.

In recognition of the need to embrace traditional justice systems in dispute resolution, the chief justice recently launched the Alternative justice systems Policy 2020 which , among other things, seeks to mainstream customary and traditional justice systems that have for long been at the periphery of the Kenyan justice system. This policy document will potentially ease access to justice by children since it will do away with the rigidities of formal justice processes that make it difficult to access child friendly justice and embrace the more flexible and friendly traditional justice system. The access to child friendly justice should afford all children, regardless of their socio-economic background or any other status, with sufficient avenues to obtain redress for any violations.

Against this backdrop, this paper argues that Traditional Justice Systems as provided for under article 159(c) of the Constitution and the Alternative Justice Systems Policy can potentially avail a child-friendly justice system thereby actualizing the right of access to justice enshrined under article 58 of the Constitution.

Keywords: Child-friendly Justice, Traditional Justice System and Access to Justice

INTRODUCTION

The promulgation of the Constitution of Kenya 2010 heralded hope to many Kenyans especially regarding their access to justice. The Constitution

mandates the State to ensure access to justice for everyone[1]. However, the same remains unattained for the most part, particularly among vulnerable groups. As one of the vulnerable groups in society, children encounter various hurdles in their quest to access justice within the formal justice system. In particular, many children: lack the requisite knowledge and resources to pursue a legal claim; lack legal capacity to initiate legal proceedings on their own; face financial constraints; have to travel long distances to access formal justice institution. They also fear ostracism by going to court; find the formal justice system harsh and undesirable; face a heightened risk of stigmatization and retaliation;[2] and face the risk of institutionalization in the formal justice system. These challenges point to the fact that the formal justice system, as currently framed, is not well suited for processing disputes involving children, thereby hampering their right to access justice.

To cure these challenges, there is need to explore alternative justice systems that can potentially provide child-friendly justice procedures. Traditional Justice Systems (TJS), recognized under article 159 of the Constitution of Kenya 2010, are people-centric. They are one such potential alternative justice system as they do not have the stringent formalities found in the formal justice system and, therefore, potentially provide a friendly avenue for children to access justice. TJS could cure these challenges by resolving disputes in a relatively shorter time and diverting children away from the harsh formal justice system. These systems are also significantly cheaper, more accessible, and less complicated than the formal justice system. Against this backdrop, this paper argues that TJS as provided for under article 159(c) of the Constitution and the Alternative Justice Systems Policy 2020 can potentially avail a child-friendly justice system thereby actualizing the right of access to justice for children as enshrined under article 48 of the Constitution.

Toward this end, this paper progresses as follows. After this introduction, part II explores the contours and architecture of a child-friendly justice system to demonstrate its core features. Part III draws from case law in expounding some of the gaps in the formal justice systems, particularly in sexual offences cases. Part IV makes the case for Traditional Justice Systems by exploring

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1 The Constitution of Kenya, 2010 Art 48.

2 Ton Liefaard, "Access to Justice for Children: Towards a Specific Research and Implementation Agenda" (2019) 27 The International Journal of Children's Rights 195.

their potential in resolving disputes. Part V highlights some of the challenges of TJS in ensuring access to justice for children. Part VI concludes.

Role and Features of Child-friendly Justice Systems

A child friendly justice system guarantees the effective implementation and respect for children's rights[3]. Such a system should deliver responsive, speedy, age-appropriate, accessible, modified, and diligent justice while respecting other fundamental human rights such as the rights to a fair hearing, privacy, and human dignity[4]. According to the Committee on the Rights of the Child, the main aim of child friendly justice systems is to create a system that respects and effectively implements children's rights after considering the child's maturity and understanding.[5] As such, a child-friendly justice system needs to be flexible enough to meet every child's specific, varied and intricate needs, but rigid enough to ensure the conviction of any persons that violate children rights.

A child-friendly justice system should provide sufficient age-appropriate information to the child regarding their trial or hearing processes[6]. This information should describe the purpose, scope and nature of each stage, including the length, location, reason for the proceedings, and the people that will be present in court. Access to relevant and reliable information will enable children to meaningfully participate in any judicial processes[7].

A child-friendly justice system should also take meaningful measures to protect a child from trauma or victimization associated with participation in a trial process. A child might find it hard to narrate any traumatic experience they had in the presence of an accused person or testify against a close family member who abused them. Such an experience may traumatize a child and

3 Aoife Daly and Stephanie Rap, "Children's Participation in the Justice System" [2018] International Human Rights of Children 299.

4 Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 2010.

5 General Comment No. 10 on Children's rights in juvenile justice (UN Committee on the Rights of the Child, 2007).

6 Stephanie Rap, "A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court" (2016) 24 The International Journal of Children's Rights 93.

7 Helen Stalford, Liam Cairns and Jeremy Marshall, "Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information" (2017) 5 Social Inclusion 207.

lead to juvenile delinquency[8]. Similarly, other children might ridicule a child in conflict with the law, causing the child to withdraw from society or experience Post Traumatic Stress Disorder (PTSD)[9]. To protect a child from such trauma, a justice system needs to, as much as possible, divert a child from the criminal justice system, ensure the child's mental health, and adopt different and creative methods of obtaining evidence from child witnesses, without necessarily having them appear before a court[10].

A child friendly justice system should also ensure swift resolution of any disputes involving a child, especially where the child is the complainant or key witness. Protracted trials that involve several court appearances detrimentally affect children's mental health and general wellbeing[11]. Children with prolonged contact with any trial report increased anxiety levels, which makes it difficult for them to give credible and accurate evidence[12]. Such anxiety and stress, if not properly managed, could persist after trial causing the child to develop mental issues such as depression and in extreme cases may result in suicide.

Kenya's formal justice system is riddled with delays, lengthy processes, rigidity, and insufficient victim protection[13]. As such, the Kenyan formal justice system has struggled to deliver child-friendly justice, necessitating the need for the adoption of an alternative justice system. The flexibility and leniency in TJS make the systems more appropriate in delivering child-friendly justice.

Challenges of the Formal Justice System

8 Julian D Ford and others, "Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions" (2006) 57 Juvenile and Family Court Journal 13.

9 Kristine Buffington, Carly B Dierkhising and Shawn C Marsh, "Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency" (2010) 61 Juvenile and Family Court Journal 13.

10 Barbara Ryan, Judge Cynthia Bashant and Deena Brooks, "Protecting and Supporting Children in the Child Welfare System and the Juvenile Court" (2006) 57 Juvenile and Family Court Journal 61.

11 Stephanie D Block and others, "Abused and Neglected Children in Court: Knowledge and Attitudes" (2010) 34 Child Abuse & Neglect 659.

12 Sarah Caprioli and David A Crenshaw, "The Culture of Silencing Child Victims of Sexual Abuse" (2016) 57 Journal of Humanistic Psychology 190.

13 Jürg Helbling, Walter Kälin and Prosper Nobirabo, "Access to Justice, Impunity and Legal Pluralism in Kenya" (2015) 47 The Journal of Legal Pluralism and Unofficial Law 347.

Sexual offence cases involving children are sensitive judicial matters adjudicated by courts of law. As such, judicial officers involved in delivering judgments in such matters ought to exercise diligence and caution to ensure they deliver child-friendly justice in the matter while respecting the child's right to a fair hearing. However, as will be discussed in detail in this paper, precedents from our courts demonstrate the inability of the formal justice system to deliver child-friendly justice in sexual offences cases. This is because of the high standard of proof usually required in criminal cases, the skewed interpretation of the law adopted by some judicial officers, the difficulty in adducing evidence that requires examination of children, and the laxity and lack of diligence in the prosecutor's office in obtaining sufficient evidence to secure convictions.

In *Martin Charo v Republic*[14]*,* the accused, a 24 year old man, was accused of defiling a 13 year old girl. The minor in the case voluntarily went to the house of the accused to engage in sexual activity. After returning home, her parents took her to the police station to record the incident and then to the hospital. The accused was convicted in the trial court of defiling the minor. He appealed to the High Court on grounds that; a crucial witness did not testify in the case, the case was not proved beyond reasonable doubt, the sentence meted against him was excessive and that the P3 form was irregularly produced. The High Court judge acquitted the accused, and held that since the complainant testified that she went to the appellant's home to have sex willingly, under no circumstances could the complainant be said to have been a victim of defilement. The judge at page 3 and 4 commented that even if the appellant did not adduce evidence as to the steps he took to ascertain the age of the complainant, the complainant behaved like an adult, and the accused ought not to be condemned for the voluntary acts of the complainant when the complainant was enjoying the relationship.

The learned judge erred in treating the defilement case as a rape case. This is with regard to the consensual element of the crimes. In rape, consent is considered a valid defense. However, in defilement where consent or the lack of it is not a requirement for the offence, it is difficult to understand the judge's reasoning given that in any case, the law regards minors as lacking the capacity to consent to any sexual transaction[15].

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14 [2016] eKLR.

15 Luis Franceschi, 'On Rape and Defilement, The Law Falls Short' Daily Nation (Kenya, 13 May 2016) <

In *Dominic Kibet Mwareng v Republic*[16]*,* the accused was charged with defiling an 11 year old girl. The complainant admitted to having engaged in sexual activity with the accused in two separate instances before the third instance, which was in issue. The complainant alleges that in the third instance, the accused followed her and took her to a maize field where he defiled her. The accused however contested the conviction on the grounds that the actual age of the complainant had not been proven and further that the P3 form produced did not support the evidence of the offence he was charged with. The P3 form produced was filled 4 days after the incident and showed no evidence of tear and showed old penetration. The court held that the exact age of the minor had not been proven, the burden of proof which lay on the prosecution had not been discharged and further that the P3 form produced was irreconcilable with the alleged penetration and therefore acquitted the accused. The learned judge held this in contravention of the already established rule that the exact age of a minor does not need to be proven in cases of defilement provided the minor is proven to be under 18 years of age save for in determination of the period of sentencing[17].

In *Daniel Ombasa Omwoyo v Republic*[18]*,* the accused was, in the trial court, charged with the offence of defiling a 9 year old girl. The trial magistrate however substituted the offence with that of attempted defilement and convicted him.[19] On appeal, the accused argued that all the components of the offence had not been proven beyond reasonable doubt and in particular, the proof of attempted defilement. The complainant, in her testimony, claimed that the accused locked her in his shop and started removing her clothes, at which point she started screaming and members of the public came to her rescue[20]. She claimed to have never slept with a man and she does not know how the same feels like[21]. A P3 form was however produced that indicated that the girl had been defiled[22]. Nevertheless, the judge acquitted the appellant[23]. This acquittal is a typical case of miscarriage of justice for the minor. In this case, the minor did not clearly know what it meant to engage in

https://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-3201580-9cs6ee/index.html> accessed 17th January 2018.

16 [2013] eKLR.

17 This was so held in the case of *Tumaini Maasai Mwanga v R. Mombasa CRA. No.364 of 2010.*

18 [2016] eKLR

19 Ibid para 11.

20 Ibid para 17.

21 Ibid para 36.

22 Ibid para 37.

23 Ibid para 44.

sexual activity or how the same would feel like and she therefore could not testify of what the man did to her, which could have been proven by the P3 form that indicated defilement. The girl was however granted no redress and the accused acquitted.

In *David Ochieng Aketch v Republic*[24]*,* the accused was charged with the offences of attempting to defile a minor and an alternative charge of committing an indecent act with a child. The accused was the complainant's barber and he was alleged to have called her to his shop while the complainant was headed for school and attempted to defile her. The complainant was traumatized and was recorded to have even wailed while in court. The P3 form did not show any defilement but rather indicated tenderness in her genital organs but no bruises were recorded. In his defense, the accused chose to keep silent. The trial magistrate convicted the accused based on the evidence of the complainant and claimed it needed no corroboration and she was satisfied the complainant was telling the truth. On appeal however, the judge held that mere tenderness of genital organs was not a sufficient ground for convicting the accused as the tenderness could have been caused by any factor[25]. He further held that there were inconsistencies in the prosecutions' case for which he could not safely convict the accused and therefore acquitted the accused[26]. The judge erred in failing to consider that the elements of the offence of attempted defilement that ought to be proven are age of the minor, a positive identification of the accused and an account of a series of events which if uninterrupted would have resulted in defilement[27]. All the elements in the case were proven and further the tenderness in her genital organs supported the same but the judge held that the tenderness in her genital organs could be caused by a myriad of factors and for that reason acquitted the accused.

In *Omus Kiringi Chivatsi v Republic*[28]*,* the accused was charged with defiling a 16 year old girl. It was alleged that the complainant befriended the accused and they had sex. She testified that she would visit the accused after school and whenever she visited, they would engage in coitus. As a result of the sexual activity, the minor got pregnant. On learning of the pregnancy, the complainants' mother forgave the accused but the chief insisted that the

[24] [2015] eKLR
[25] Ibid para 24.
[26] Ibid para 16.
[27] The Penal Code CAP 63, s 388 defines attempt to commit offences.
[28] [2017] eKLR

accused be arrested and tried for defiling the minor[29]. The accused was found guilty of defiling the minor at the trial court and sentenced to 15 years imprisonment[30]. He appealed on the grounds that the complainant was not a reliable witness, the prosecution did not prove its case beyond reasonable doubt and further that the complainants' age had not been proven. The prosecution claimed that the complainant told the court that she was 16 years old and further her mother corroborated her evidence by claiming she was 16 years of age[31]. The judge however acquitted the accused on grounds that the age of the complainant had not been proven and further the conduct of the complainant in willingly engaging in sexual activity with the accused meant that she was enjoying the relationship until she got pregnant. He held that there was no evidence that the accused had deceived the complainant to have sex with her and the accused should not spend 15 years in prison for the consensual sexual activity he had with the minor[32].

The judge erred in failing to consider the mischief that was intended to be prevented in the enactment of the Sexual Offences Act which is that minors do not have the capacity to consent to sexual activity. The judge also erred in acquitting the accused on the ground that the complainants' age had not been proven. The judge could have ordered that more evidence be adduced to enable it assess the exact age of the minor and furthermore, the exact age of the complainant is especially relevant in sentencing, as was held in *Lameck Okeyo Onyango v Republic* [2014] eKLR. When proving the offence of defilement, the court only needs to satisfy itself that the complainant is under 18 years of age, which had already been proven. The prosecution should also have been proactive enough to ensure that their evidence proved their case beyond reasonable doubt but instead failed in tendering sufficient evidence to prove the age of the complainant.

In *Michael Lokomar v Republic*[33]*,* the accused was charged with attempting to defile a 7 year old girl. It was alleged that he went to the complainants' home, spread a mat and asked the complainant to sleep on it. He then removed both their clothes and is alleged to have placed his penis between her thighs and anal region. The complainant then cried at which point her father is said to have come to her rescue. The complainant's father called the

29 ibid at page 2.
30 ibid at page 1.
31 ibid at page 2.
32 ibid at page 3.
33 [2017] eKLR

police and subsequently, the accused was arrested and charged with the offence of attempted defilement. The trial magistrate found him guilty and sentenced him to ten years' imprisonment. The accused appealed on grounds that the trial magistrate should have considered that he overstayed in police custody, that all the plaintiff witnesses were members of the same family and ought to have been treated as single evidence, that key witnesses were not called to testify such as the alleged neighbors, that there was no medical report produced and finally that there was no age assessment done on the minor to prove her alleged age[34]. The High Court judge acquitted the accused on grounds that the evidence of the vulnerable complainant, who gave her testimony through an intermediary, was not corroborated as it had some discrepancies compared to the testimony of all other witnesses who testified[35]. This case indicates a glaring gap in the law since the law provides that the evidence of a child victim of sexual abuse does not need any corroboration provided the court satisfies itself that the minor is telling the truth[36]. The same standards ought to be extended to a minor who is too vulnerable to testify on their own and testifies through an intermediary.

In *Alphonce Odhiambo Olwa v Republic,*[37] the accused was charged on the main count with the offence of defilement. He also faced an alternative charge of committing an indecent act with a child. It was alleged that he defiled his neighbour, a student aged 17 years, and further impregnated her. He was convicted but appealed on grounds that the particulars of the offence of defilement had not been sufficiently proved and therefore the case was not proven beyond reasonable doubt[38]. He claimed that the necessary ingredients of the offence that ought to be proven are: proof of penetration, positive identification of the alleged perpetrator and finally the age of the victim. The victim in her testimony claimed that she knew him and further that he defiled her[39]. The prosecution was tasked with producing DNA evidence to prove that the appellant was the father of the unborn child. The prosecution did not however avail such evidence and as a result, the judge held that the evidence of the victim could not be relied on entirely. He claimed the victim was not a credible witness and her evidence needed corroboration, which would only be done by the DNA test results.[40] Failure to avail such evidence

34 ibid at page 2.
35 ibid at page 4.
36 The Evidence Act CAP 80, s124.
37 [2017] eKLR
38 ibid para 3.
39 ibid para 13.
40 ibid para 20.

by the prosecution caused the appellant to be acquitted. This case demonstrates the systemic errors in the formal justice system and a lack of role fidelity among all stakeholders from the prosecution in carrying out effective investigations to the judges in applying the law without any regard to the best interest of a child.

In *John Kimani Njoroge v Republic*[41]*,* the accused was charged with the offence of committing an indecent act with a child. The particulars of the offence are that he was a librarian in a language centre where the complainant and other children attended classes. It is alleged that he intentionally and unlawfully held the waist of the 13 year old complainant and kissed her on the mouth. The child, being traumatized by the incident, ran to her mother holding her waist in utter confusion and explained the incident to her mother. The trial court convicted the accused of the offence and sentenced him to ten years' imprisonment. The High Court however overturned the judgement and held that the evidence adduced did not support the offence of an indecent act and therefore acquitted the accused[42].

According to section 2 of the Sexual Offences Act, an indecent act involves contact between any part of the body with the genital organs, breasts or buttocks of another[43]. Kissing a minor in the mouth does not therefore have any redress in law. This is despite the trauma that the incident may visit on a child. This indicates a gap in the law as the law does not appreciate the understanding of sex from a child's perspective. A child understands sex differently from an adult. Similarly, children in different ages appreciate and understand sex differently. For children, sex has a very narrow and confining definition[44]. Therefore, the law should strive and protect a child's innocence by protecting her from what she, in her tender age, views as sexual violence. The law ought to incorporate and appreciate the views of those it is intended to protect.

Undoubtedly, despite having elaborate laws that provide for the protection of children from sexual abuse and other related offences, systemic issues, a narrow and skewed interpretation of the law, and the high standard of proof in criminal cases prevent the formal criminal justice system from delivering

41 [2018] eKLR
42 ibid at para 1.
43 The Sexual Offences Act NO. 3 of 2006, s2(1)
44 Richard Ives, Children's Sexual Rights - The Rights of Children edited by Bob Franklin (first published 1986, Basil Blackwell Ltd) 143, 152.

justice to child victims of sexual offences. This creates the need for having a more flexible legal system dealing with children matters. Due to their legitimacy, flexibility, and effectiveness, Traditional Justice Systems might offer better protection to child victims and children in conflict with the law.

Potential of Traditional Justice Systems in Child-friendly Justice

Traditional Justice Systems refer to informal justice systems that existed before colonialism. One of the core features of such systems which made them effective is their legitimacy[45]. These systems were developed by different communities to deal with their unique challenges. As such, people found it easier to comply with the laws since they responded to their inimitable needs[46]. However, after independence, the country gradually moved away from these systems in favour of the formal colonial laws inherited from the British. These inherited laws were developed for the Western countries and were only imported in the country to, among other functions, oppress and intimidate Africans[47]. Article 11 of the Constitution of Kenya 2010 attempts to redress this by promoting culture and such alternative justice systems[48]. The Alternative Justice Systems Policy, 2020 also advocates for the mainstreaming of traditional justice systems as a means of dispute resolution since it is more accessible and cost effective compared to formal justice systems[49].

According to the Office of the United Nations High Commissioner for Human Rights, the use of TJS in the resolution of disputes is more appropriate than

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45 Estelle Hurter, "Access to Justice: To Dream the Impossible Dream?" (2011) 44 The Comparative and International Law Journal of Southern Africa 408.

46 Francis Kariuki, "African Traditional Justice Systems" (2018) http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf accessed November 24, 2020.

47 Abra Lyman and Darren Kew, "An African Dilemma: Resolving Indigenous Conflicts in Kenya" (2010) 11 Georgetown Journal of International Affairs 37.

48 Article 11 of the Constitution of Kenya, 2010 recognizes the importance of culture and mandates the country to promote all forms of cultural expression. Article 159 allows the Judiciary to promote traditional justice systems (TJS) to enhance access to justice and reduce the delays in resolving disputes.

49 United Nations Office on Drugs and Crime, "Partners Welcome Move to Mainstream Alternative Justice Systems in Kenya" (*www.unodc.org*, 2020) https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html#:~:text=AJS%20may%20be%20defined%20as accessed November 24, 2020.

the formal system since they use familiar languages; and the informality and simplicity associated with TJS provides an avenue for healing from any abuse[50]. In Kenya, TJS worked immaculately in the past in protecting children from sexual abuse. An examination of TJS in the Gusii community reveals that Gusii elders imposed very hefty fines on any person who defiled a child or committed an indecent assault with a child. For instance, such a person would have to pay a fine equivalent to a six month salary and be shamed by the mature women in the community to deter other men from raping young girls.[51] In Limpopo, South Africa, the community observed that children feared the police and ran away whenever they saw a police officer. Such fear made it impossible for children to cooperate with police officers or other judicial officers since they believed that the police would arrest and torment them. The fear also made it difficult for them to report any offences to police officers[52]. However, adopting traditional justice increased the number of children who willingly cooperated in proceedings and complied with any directives issued by judicial officers.

Generally, many children who end up in borstal institutions or remand centers find it hard to reintegrate into society due to the labels placed on them and the perceptions by other children[53]. Since the main focus of TJS is reconciliation and reparation, adopting the system could divert children in conflict with the law from the harsh penal system[54].

Challenges of Traditional Justice Systems in Child-friendly Justice

TJS has several challenges that may hamper access to child-friendly justice. For instance, some cultures advocate for harmful practices such as child

50 Office of the United Nations High Commissioner for Human Rights, "HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA" (2016) https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf accessed November 24, 2020.

51 Brett L Shadle, "Rape in the Courts of Gusiiland, Kenya, 1940s-1960s" (2008) 51 African Studies Review 27.

52 Boyane Tshehla and Institute for Security Studies, *Traditional Justice in Practice : A Limpopo Case Study* (Institute for Security Studies 2005).

53 Carol A Hand, Judith Hankes and Toni House, "Restorative Justice: The Indigenous Justice System" (2012) 15 Contemporary Justice Review 449.

54 Felisa U Etemadi, "Community-Based Diversion for Children in Conflict with the Law: The Cebu City Experience" (2005) 15 Children, Youth and Environments.

marriages, female genital mutilation, and gender discrimination[55]. If the country adopts TJS in dispute resolution, it might promote such negative cultural practices that harm children. This challenge calls for the selective adoption of cultural practices where society only promotes the positive aspects and condemns any negative practices associated with culture. While selectively adopting the cultural practices might appear cumbersome, the country could develop a committee that will evaluate all the cultural practices in the different communities and identify the acceptable practices which can be adopted and promoted in dispute resolution.

Customary law is also diverse since every Kenyan community has different customs which influence their customary law. As such, it would be difficult to come up with a unified law or system against which elders can resolve disputes. However, despite the lack of unity, all customary practices have fundamental principles such as justice, retribution and ensuring peace. TJS can uphold and prioritize these principles in resolving all disputes[56].

CONCLUSION

Access to Justice remains an intractable problem in Kenya despite the right being enshrined in the Constitution and other statutes. However, challenges in Kenya's formal justice system make it difficult to provide access to child-friendly justice. As such, this paper has made the case for the adoption of traditional justice systems in delivering child-friendly justice owing to their flexibility, accessibility and reliability.

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55 Ann Njeri Joseph, Joshia Otieno Osamba and Josiah Kinyua Murage, "Role of Culture in Conflict Management- a Case of Tetu Sub-County, Kenya" (2019) 8 Journal of Arts & Humanities 68, 70.

56 Francis Kariuki, "African Traditional Justice Systems" (2018) http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf accessed November 24, 2020.

Pouring New Wines in Old Wineskins: State Capture, Contestations and Conflicting Understanding of the Paralegalism in Kenya with the Advent of the Legal Aid Act 2016

Dr. Annette Mbogoh*

ABSTRACT

Community paralegals have played a critical role in promoting access to justice for indigent communities in Kenya. Civil society organizations such as Kituo cha Sheria-Legal Advice Centre pioneered the use of the paralegal approach. Paralegals live within the communities that they serve. They respond swiftly to injustices at grassroots levels. Since the inception of the movement in 1973, paralegals have been trained, mentored and supported by civic actors. With time, the movement organically grew establishing informal structures for improved coordination, support, capacity building and outreach. Community and or Social Justice Centres were founded to operate as "first-aid legal centres" in informal settlements, urban, peri-urban and rural areas. Despite their interventions, community paralegals were not legally recognized. They operated in a legal vacuum and were illegitimate legal aid providers. Sustained advocacy resulted in the enactment of the Legal Aid Act 2016, which recognized paralegals viewed as legal aid service providers. The Legal Aid Act has however redefined the concept of paralegalism shrouding it with restrictions and regulations that threaten the historical gains made towards legal empowerment. The article explores the contestations of paralegalism as it has been known before the Legal Aid Act 2016 and the consequences of formalization and legal recognition.

Keywords: *Paralegalism, access to justice, legal empowerment, power, formalization, recognition, state capture*

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INTRODUCTION

Broadly speaking, the concept of access to justice is an aspect of the rule of law. Justice is vital in securing the human rights of every person. Accessing justice requires addressing both the supply and demand. It involves empowering people to seek justice and securing mechanisms to deliver justice[1]. In its broadest sense, access justice includes access to fair and equitable laws, access to public education and information, access to the law and related procedures, access to the courts and tribunals, access to alternative dispute resolution and access to fair administration of justice[2].

It is a tenet in legal systems that ignorance of the law is no defence. This grund norm presumes that every person is legally literate. The Task Force on Justice estimates that the approximately 1.5 billion people are unable to access justice[3]. The reality is that majority of Kenyans are unaware of the laws that govern and regulate their lives. The law is constructed in technical and complex language that is difficult for lay people to understand. In addition, access to basic legal services involves consulting an advocate who will impose fees for professional services rendered. If disputes have to be resolved in court, the litigant has to cater for court and disbursement costs to facilitate the matter. As a result of the high cost of formal justice, majority of Kenyans opt to pursue informal avenues e.g. alternative dispute resolution, paralegals or alternative justice systems.

To achieve enhanced access to justice it is imperative to simultaneously build capacities of the judicial sector whilst legally empowering grassroots communities. Therefore, access to justice programmes should not solely focus on legal literacy of communities; they must also address structural barriers within justice systems.

The United Nations Development Programme (UNDP) defines access to justice as "empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and

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1 International Development Law Organization (IDLO) (2020) https://www.idlo.int/what-we-do/access-justice (accessed on 15 November 2020).

2 ibid

3 HiiL (2019) Innovating Justice: Needed and Possible: Report of the Innovation Working Group.

countering biases inherent in both systems, to provide access to justice for those who would otherwise be excluded"[4].

It is against this backdrop that the concept of paralegalism or the paralegal approach emerged. Since pre-independence, Kenya has employed paralegalism as a crucial aspect of access to justice. The Constitution espouses that the sovereignty of the Republic and judicial authority is derived from the people of Kenya and should be exercised in line with their aspirations and ensuring their active and meaningful participation as users of justices and courts. The paralegal approach is now anchored in the Constitution of Kenya 2010. Paralegalism exemplifies this constitutional transformation.

Part one of the article begins by defining the concept of paralegalism. It distinguishes the terminologies of "paralegal" and the "community paralegal" as provided in traditional legal empowerment programming and the Legal Aid Act 2016 (hereinafter "the Act"). In part two, the article highlights the legal reforms on paralegalism and critically analyses power within the strategy. The article problematizes the contestations between the two binaries i.e. the old versus the new paralegalism. The analysis considers three aspects of regulation i.e. curriculum development and training, accreditation and financing. Finally, the article discusses conclusions and recommendations.

Defining "the Paralegal": Conflicting Perspectives within the Kenyan Jurisdiction

The term "paralegal" is closely related to the terms "paramedic or paramilitary". The latter are a category of workers found in the medical or military profession.[5] Consequently, paralegals are also found in the legal profession. They support lawyers, advocates and judicial officers.

The Act defines and distinguishes the terms "paralegal" and "accredited paralegal". Section 2 of the Act provides that an "accredited paralegal" is a

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4 Smith R.H. (1919) *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law, with Particular Reference to Legal Aid Work in the United States* Carnegie Foundation p.9.

5 Soy A (2018) "Kenya's Community-Based Paralegals" in Maru V & V Gauri (Eds) *Community Paralegals and the Pursuit of Justice* Cambridge: Cambridge University Press pp. 165-209 https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/ (accessed on 22 November 2020).

person accredited by the Service to provide paralegal services under the supervision of an advocate or an accredited legal aid provider". Additionally, section 2 enumerates a paralegal alongside other legal aid providers.[6] On the other hand, the same section defines a "paralegal" as a person employed by the Service or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education."

The Paralegal Support Network (now Paralegal Society of Kenya) simply defines a paralegal as "a community-based person, who is not a lawyer, but who has basic legal knowledge and skills on a voluntary basis and outside or in addition to their normal vocation".[7] Paralegal workers are viewed as development workers and community members who educate people about the law or offer basic legal services. According to the Paralegal Society of Kenya, paralegals can also refer to persons who are part of the legal process e.g. probation and children officers, court clerks etc. Although these persons are not lawyers, they offer essential legal services as part of their work[8].

There is a departure between the definition of the term "paralegal" by the Paralegal Society of Kenya and the law. The concept of a paralegal as espoused by the Paralegal Society of Kenya is in line with the understanding of non-state legal aid service providers. A paralegal is viewed as a community-based person that provides basic legal services alongside other vocational roles. Paralegalism is viewed as a skill as opposed to a profession. Legal empowerment organizations select trainees from respectable members of the community who undertake short-term skills transfer training session. On the other hand, the law conceptualizes paralegalism as a professional qualification requiring accreditation, licensing and regulation by a state agency. The difference in definitions sets the stage for even more contestations on the existing paralegal approach and what is stipulated in law. While there is a place for professional paralegals, the role of community-

6 "Legal aid provider" means —(a) an advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organization or public benefit organization; (b) a paralegal; (c) a firm of advocates; (d) a public benefit organization or faith-based organization; (e) a university or other institution operating legal aid clinics; or (f) a government agency, accredited under this Act to provide legal aid.

7 Paralegal Support Network (PASUNE) (2018) *Handbook for Paralegals*. Nairobi: PASUNE.

8 ibid.

based paralegals in enhancing access to justice cannot be undermined. The legal exclusion of community-based paralegals is the foundation of challenges relating to their recognition, legitimacy and financing.

The Organic Emergence of Paralegalism as a Legal Empowerment Approach in Kenya

The former President: A Historical Perspective Moi regime was marked by egregarious human rights abuses such as unlawful detention, torture, extrajudicial killings and excesses of the Presidency among others. There was clamping down of the freedom of expression, opinion and inaccessibility to information. The voices of the community, much less of the indigent, was silenced; they were rendered invisible to a powerful state. Against this backdrop, the paralegal approach in Kenya evolved from an extended tradition of activism during the Moi's administration[9].

Prior to that, the legal profession was underdeveloped and principally operated as an administrative body in service to the colonial state.[10] Under the colonial rule, the legal system was incapable of assisting local communities to access justice. The formal system of law was foreign and superimposed on the people. Customary law, which resonated with Kenyans, was mostly viewed as being repugnant to morality and justice.

A historical reflection on paralegalism reveals that the approach found its origin within informal spaces consisting of community-established structures. The approach organically evolved outside formal spaces of law and regulation as a natural response to the authoritarian and dictatorial regimes. The paralegal space was an open, unrestricted, unregulated and non-state space where empowered communities to vocalize their views and priorities against repressive regimes within their localities. Paralegalism was not concerned with conditionalities in order to engage within its spaces. It focused on dedication, passion and drive for adherence to human rights ethos. That notwithstanding, the paralegal approach has been seen as dynamic and ever-

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9 Moy A (2018) "Kenya's Community-Based Paralegals" in Maru V & V Gauri (Eds) *Community Paralegals and the Pursuit of Justice* Cambridge: Cambridge University Press pp. 165-209 https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/kenyas-community-based-paralegals/ (accessed on 22 November 2020).

10 ibid

changing as it remodels itself to address the contemporaneous community justice needs.

In this section, the article traces the origin of paralegalism. It critically analyses the manifestation of power within the paralegal movement in Kenya. It further discusses the struggle for recognition, the advent of formalization and problematizes the vagary of regulation of paralegalism and legitimacy.

Paralegalism in Colonial Kenya

Through a series of laws passed from 1897 to 1930, the British colonial government established a plural legal system that applied a separatist approach. The British settlers and indigenous Kenyans had different rules applicable to them. The latter were subjected to an informal legal system based on administrative as opposed to judicial principles. The former had access to a formal legal system that was based on judicial principles, protection and due process within formal courts. The matters affecting indigenous Kenyans were addressed by native courts and local tribunals using customary and religious laws, which were not found as repugnant to justice and morality.

In the same vein, the British colonialists excluded indigenous Kenyans from the legal profession. In native courts, judicial officers had powers to license Africans to deliver limited legal services as paralegals than they did within independent Kenya. The individuals were known as "*vakeels*" meaning "local persons knowledgeable in basic court procedures, although possessed of no legal qualifications"[11]. The Legal Practitioners Act (1906) barred *vakeels* from formal legal practice as the Advocates Act Cap 16 of the Laws of Kenya excludes paralegals from formal practice of law. The legal space was a closed and restricted space; it was expressly and impliedly rendered inaccessible by members of the public.

In 1949, the legal profession was extended to non-Europeans. However, it was only until the later 1960s that African lawyers joined the profession. This was due to the colonial policy that denied state funding to African students wishing to study law. Also the British colonial government was seemingly "obsessed with fear that lawyers would promote political difficulties for it. Indigenous lawyers were regarded with extreme distrust. This attitude stemmed in part from the British experience in India…and partly from West

[11] ibid.

Africa…where lawyers were already agitating for the safeguarding of the rights of Africans"[12]. The colonial authority preferred to rule by exerting visible and invisible power to control the conduct, minds, perceptions and attitudes of the colonized. It was perceived that legal education would in a sense decolonize minds of young African lawyers stirring a revolution and push for independence.

As a result of the plural legal system and systematic exclusion of African lawyers, the Law Society of Kenya failed to address the problems facing the African community until after independence. Instead, the problems of indigenous Kenyans were addressed through public meetings (*barazas*) with the local administration. The *barazas* provided a forum for indigenous Kenyans to deliberate on social issues, resolve impending disputes and raise complaints with the colonial state. Opinion leaders had a strong voice within these spaces. However, the *barazas* were also used to disseminate and enforce colonial policies.

It is clear that during pre-independence, the colonial law and policy aimed at creating visible and invisible barriers to exclude Kenyans from the formal legal space. Indigenous Kenyans were restricted to the informal, community-based space that was at a lower cadre than the formal, state-based space. The former evolved into a safe space where locals exercised their freedom of thought, opinion, expression and resolved disputes.

Paralegalism in Independent Kenya

During the regime of Kenya's President Kenyatta and the early years of Moi's (1978–82), the first crop of African lawyers began joining the LSK. In 1960, a committee was established to investigate and improve legal education in Africa. Its recommendation resulted to the founding of legal education programmes for African students e.g. the Faculty of Law at the University of Nairobi.

[12] Ghai YP (1981) "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" in Dias CJ et al *Lawyers in the Third World: Comparative and Developmental Perspectives* New York: International Center for Law in Development p.148.

In 1973, a small group of young African lawyers from the University of Nairobi established Kenya's first non-governmental legal aid organization[13]. It was named *Kituo Cha Mashauri*; it was later renamed *Kituo cha Sheria* and registered as "Legal Advice Centre"[14]. The founders, who are now esteemed members of the Kenyan legal fraternity, recognized the need for legal aid services for indigent Kenyans. Kituo cha Sheria (hereinafter "KITUO") has since then largely dealt with legal disputes relating to housing, labour and land. The organization targeted domestic workers, manual labourers, inhabitants of informal settlements and victims of forced evictions.

The number of African lawyers and law students volunteers in Kenya grew. Their increasing numbers was still insufficient to adequately supply the demand for pro bono legal services. To bridge the gap, KITUO began training opinion leaders and community members in basic law so that they could assist with cases.[15] These people came to be known as Kenya's first paralegals.

By the mid-1980s, African Kenyans would finally constitute the majority of the legal profession. However, there was an abrupt increase in systematic human rights violations and repression by government. Organizations that publicly criticized the government were blacklisted, targeted and intimidated by the state officers.[16] In response, solidarity between lawyers, activists and the LSK members was intensified. For instance, KITUO transformed into an agent of social change. As it grew, KITUO forged strategic partnerships with the National Council of Churches of Kenya (NCCK) and young lawyers in the University of Nairobi's law school. The affiliation expanded KITUO's presence and scope in rural areas.

Other civil society organizations adopted the paralegal approach. In 1983, the Public Law Institute was founded. It established legal aid clinics manned by volunteer advocates, community paralegals and law students. In the same vein, ICJ adopted best practices on the use of community paralegals and "barefoot lawyers" the International Commission of Jurists (ICJ) from Asia and

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13 The founding members of Kituo cha Sheria included the late Mr. Steve Adere, Rtd Justice Vitalis Juma, Dr. Willy Mutunga (Chief Justice Emeritus), the late Dr. David Gachuki, Hon. Mary Ang'awa, Murtaza Jaffer and Prof. Shadrack Gutto.

14 Kituo cha Mashauri is Swahili for Centre for Advise. While Kituo cha Sheria means Legal Advice Centre.

15 Supra (n. 9).

16 For example KITUO was petrol bombed during this repression. The LSK maintained a low profile.

Latin America [17] . Multiparty politics saw the mushrooming of more organizations that became key actors in the contemporary paralegal movement[18]. A strong grassroots network was established by many of these actors[19]. Each of these organizations began strategically deploying paralegals in programs promoting legal awareness, rights promotion, and conflict resolution. In some organizations, paralegals worked as human rights defenders or monitors. The paralegals were responsible for creation of public legal awareness. Opinion leaders or highly respectable member of the community were identified, trained and deployed to facilitate rights awareness and advise communities on action to when rights are violated [20] . The paralegals worked closely with pro bono advocates and legal aid organizations. The dedicated and skilled paralegals sought to resolve justice challenges themselves and mediate disputes reported by clients. Where necessary, they support clients in formal legal proceedings.

Due to the *de facto,* grassroot organization supported the paralegal movement, it was only natural for the organization to evolve into partnership and collective action. In 2000, twenty-six paralegal organizations established the Paralegal Support Network (PASUNE)[21]. The aim of the network was to share experiences and collaborate to advance paralegalism in Kenya. Two years after the inception of PASUNE, harmonized paralegal training materials were developed. The curriculum was shared with the Kenya School of Law as contribution towards the design of a diploma programme for paralegal studies. PASUNE was actively involved in advocacy campaigns around the then Legal Aid Bill and establishment of a small claims court where paralegal services could be further utilized.

17 Supra (n.9).

18 Amondi C (2014) "Legal Aid in Kenya: Building a Fort for Wanjiku." in Ghai YP & J Cottrell-Ghai (Eds) *The Legal Profession and the New Constitutional Order in Kenya*, 201–20. Nairobi: Strathmore University Press p. 205; Feeley MC (2006) *Transnational Movements, Human Rights and Democracy: Legal Mobilization Strategies and Majoritarian Constraints in Kenya 1982-2002* PhD Dissertation, University of California, San Diego pp. 486,487.

19 Other organizations that later joined the legal empowerment network included the Legal Resources Foundation (LRF), Center for Legal Education and Aid Networks (CLEAN), Widows' and Orphans' Welfare Society of Kenya (WOWESOK), CRADLE-The Children's Foundation) and the Education Centre for Women in Democracy (ECWD).

20 Supra (n.9).

21 In 2020, PASUNE was renamed Paralegal Society of Kenya.

As discussed above, paralegalism in Kenya developed incrementally from the 1900s. It has slowly been embedded into society through informal, self-regulating rules outside of state involvement and formal legal framework on its recognition, coordination, administration and institutionalization. The advent of the Legal Aid Act in 2016 is a paradigm shift of paralegalism as earlier manifested. The law through the Act seems to reinvent the will and presuppose the pouring of a new paralegal approach onto a fabric of an already existing and vibrant movement.

A Power Analysis of Paralegalism Before and After the Legal Aid Act 2016

Legal empowerment strategies such as paralegalism challenge power and systems of domination and authoritarianism. The concept of "power" is complex and contested and its meaning is as diverse as it is contentious. Power is seen as being held by actors-some who are powerful and others are powerless. In this particular case, power is arguably held by state actors, influential corporates and wealthy individuals. In comparison, grassroots and indigent communities are powerless in decision-making, agenda setting, law-making and development. Power is seen as a zero-sum concept whereby gaining power for one means others must give up power. Since the powerful rarely give up power, handing over power often involves conflict and struggle.

Paralegalism is a strategy whereby power is transferred to the people with the aim of building agency, capacity and legal empowerment to transform and shape lives using the law as a tool. To illustrate the power dynamics within evolution of paralegalism in Kenya, Steven Lukes theory on the typology of power becomes particularly useful. Lukes asserts that power has four dimensions i.e. "power over", "power to", "power with" and "power within". "Power over" is negative power displayed by use of coercion. The other three forms of power are positive power.[22]

[22] Lukes' also added the form of "beneficent power" whereby the government exercises its authority and power to protect and promote the human rights of all; Crawford, G. and B.A. Andreassen (2013) "Human Rights, Power and Civic Action: Theoretical Considerations" in Andreassen BA and G Crawford (Eds) *Human Rights, Power and Civic Action: Comparative Analyses of Struggles for Rights in Developing Societies* Abingdon, Oxon, Routledge p. 6.

Since its inception in the 1970s, the paralegal movement demonstrated elements of positive power. "**Power to**" is about agency, empowerment and capacity which are all characteristic of the paralegal movement as we have known it. The knowledge of the law has always been a preserve of elitists and members of the legal fraternity. In essence paralegalism dismantles the existing barriers for grassroots communities to access legal knowledge. The capacity building of communities into paralegals within their localities empowered ordinary women and men into change agents. Their capabilities have been expanded. As a result, opportunities of joint action or "**power with**" are opened up. In this case, paralegals were seen to jointly provide each other mutual support through the establishment of community or social justice centres. Through these centres, citizen education and advocacy efforts were enhanced based on the belief that every person has "power to" bring change. Power with is collaborative power; the development of paralegalism was centred around social mobilization and building of alliances through social movements. The paralegal network is closely linked and founded within social mobilization. The establishment of community or social justice centres demonstrates the collaborative power generated through paralegalism. "Power with" requires finding commonalities and building on collective strength. It concerns building capacity through agency. Like "power to" is entails the process of empowerment. The history shows paralegal groups building coalitions and alliances such as Paralegal Society of Kenya.

Effective legal empowerment programmes are hinged on generation of power from within an individual. Paralegalism has to do with agency and the ability to act and change the world. It involves the development of an individual's sense of self-respect, self-worth and self-esteem. "Power within" increases an individual's potential to act upon the world. Through the legal knowledge they garner, paralegals undergo the process of empowerment, which inspires agency from within.

Prior to the Legal Aid Act, paralegalism operated in informal spaces and civic actors were actively involved in generating power to, power with and power within paralegal groups within the country. Formalities and regulation was minimized and the focus of the movement was community-driven change through the use of the law. The disadvantage of the informal and community-based paraleglism is the absence of legitimacy from the state. Consequently, the lack of recognition easily discredits the work of paralegals.

The advent of the Act tilts the power scales in favour of the State. Through the Act, the practice of paralegalism receives recognition and legitimization

from state law. However, the law re-conceptualizes and re-designs paralegalism in exclusion of the already existing, entrenched and self-regulated paralegal movement. The "new" form of paralegalism must operate within a formalized space shrouded by specific rules and regulation in training, accreditation and practice. The power to formulate over-regulation and ensure compliance to these new regulations is conferred on state agencies. The new regulations are designed without due regard to the dynamics on the grounds that relate to inequalities and inequities. Instead, the "new", legalized form of paralegalism is expected to be imposed on an already well-established social and countrywide movement of community-based paralegals.

The power of law and the state is evident in the conceptualization and implementation of the new form of paralegalism. Lukes defines "power over" as the ability of powerful forces to secure compliance by less powerful people. In this case, the state and its agencies formulated the draft regulations in isolation. Through the power of the law, the state will secure compliance with these new regulations. Engagement with stakeholders was done after the conceptualization of the regulations. Even then, due to limited resources, stakeholder engagement was inextensive. One aspect of "power over" is that power struggles involve empowerment for some people at the expense of disempowerment for others. The power of law is in its ability to define paralegalism and confer importance on its own definition than that by civic actors and communities. Individuals that served as community paralegals prior to the Act that do not possess the pre-requisites under the new regulations will be unable to provide paralegal services.

Formal Recognition or State Capture: The 2016 Legal Aid Act in Kenya

Upto 2016, the lack of formal recognition of paralegals posed serious challenges for the movement. The paralegals faced instances when they were dismissed for lack of legitimacy or accused of masquerading as advocates.[23] The Advocates Act prohibited any person who is not admitted as an advocate of the High Court of Kenya from providing legal advice and representation. Local leaders demanded a clearer understanding of who a paralegal is, the nature of training required and the roles they are authorized to play. The legal challenges of paralegalism limited its effectiveness in enhancing access to justice. Therefore, paralegals faced difficulties accessing courts and supporting clients to mediate disputes, monitor court proceedings and administration of cases.

[23] Supra.

On this basis, legal empowerment organizations sustained advocacy efforts that led to the enactment of the Legal Aid Act 2016 which recognizes paralegals as legal aid providers so long as they are supervised by an advocate or an accredited legal aid provider. The Legal Aid Act encapsulates some gains for access to justice and more specifically paralegalism.

Firstly, the Act, as discussed hereinabove, defines and gives formal recognition of paralegalism. It defines legal aid as broadly including legal empowerment activities that are undertaken by community paralegals such as raising legal awareness, alternative dispute resolution and community driven advocacy initiatives. The role of paralegals in the Legal Aid Act is not limited to courts and other formal forums traditionally associated with legal aid. Secondly, the Act confers accredited paralegals with authority to provide legal advice and assistance that previously could only be done by advocates. Thirdly, the Act establishes the Legal Aid Fund through which accredited paralegals can access financing for provision of legal aid. Therefore, paralegals are prohibited from soliciting or accepting payments from clients who qualify for legal aid. The Act criminalizes paralegals who seek financial gain in exchange for their services. Fourthly, the Act obliges the National Legal Aid Service to develop programmes "for legal aid, education and the training and certification of paralegals." This mandate of the National Legal Aid Service may positively contribute towards harmonization of training programmes and certification. However, the training programmes and certification may potentially be exclusionary in terms of the minimum qualifications for trainees, accessibility of the training programmes and inflexibility in regulation.

That notwithstanding, the formal recognition of paralegalism comes with trade-offs, over-regulation heavy state involvement and a complete reinvention of paralegalism as we have known it. The Legal Aid Act interacts with and yet supersedes the existing legal empowerment programming. It is imperative to be alive to the fact that the law does not and cannot operate in a vacuum; it operates within a context riddled with power intrigues, interests and dynamics.

In the case of paralegalism, the prolonged absence of a specific legal framework resulted in the development of "informal" rules and regulations outside the officially sanctioned state arena. These informal rules and regulations were enforced and reinforced without state action. For instance, a training curriculum for community paralegals was developed under the auspices of the then PASUNE. Civic actors have used the PASUNE

curriculum in training community paralegals in weekly modules. In the same vein, a formal three years training programme on paralegalism was also offered by the Kenya School of Law which mainly targeted professional paralegals, court and or advocates' clerks.

The Legal Aid Act and its appurtenant rules allocate responsibility for regulation of paralegalism. The assignment of roles and responsibility has however not been made clear on the ground. Mechanisms for coordination, cooperation and dissemination of information on implementation of reforms among all actors and stakeholders have not been consistent and well established. The National Legal Aid Service plays a critical role in coordination, cooperation, awareness raising and overall implementation of the law. However, due to funding constraints, the Service is unable to effectively play this role. New developments are occurring within mostly closed and or invited spaces. There has been a deliberate effort by organizations working with paralegals to seek information on reforms and educate existing community paralegals on how they will be affected. The danger of using this approach in implementing the Act is that there is inadequate participation of stakeholders. Further, crucial changes in paralegalism may be made without the knowledge of existing paralegals.

A case in point involves and implement the accreditation of paralegals. The draft regulations were not widely shared with stakeholders and the general public. On 8th July 2020 and 14th July 2020 respectively, the Legal Aid Code of Conduct for Accredited Legal Aid Providers, 2019 and the Legal Aid (General) Regulations, 2020 were gazzetted. Rule 29 of the Legal Aid (General) Regulations, 2020 provides as follows:

(1) A person is eligible for accreditation as a paralegal if the person-
    (a) has completed a training course for paralegals that is approved by the Council of Legal Education;
    (b) is employed or supervised by an advocate or accredited legal aid provider; ***and***
    (c) is a member of a duly registered association of paralegals. (Emphasis added)

The application of rule 29 disqualifies a majority of existing community paralegals from accreditation. The use of the term "and" in the enumeration of the grounds for eligibility may be interpreted to mean that all the three conditions must be present for accreditation of a paralegal.

As much as the law does not apply retrospectively, it is good practice to have transitional provisions in any new legislation. Further, the regulations view paralegals as mere appendages to advocates as opposed to collaborators and change agents in the access to justice sphere. The Legal Aid Act and its appertenunt rules do not have transitional provisions providing directions on how to deal with already existing legal empowerment programmes other than the legal aid pilot projects. Therefore, it is unclear what happens to the community paralegal organization and coordination and uncertain organically grew since Kenya's independence.

As discussed hereinabove, accreditation is a critical precondition for providing legal aid within the purview of the law. That notwithstanding, rule 29 only acknowledges paralegal training programmes that have been approved by the Council of Legal Education. Also, paralegals are required to be members of a duly registered association of paralegals. It is not clear whether this will refer to only one paralegal association or many paralegal associations may be registered for membership. As it stands, the National Legal Aid Service has only recognized the Paralegal Society of Kenya. Therefore, paralegals from across the country will have to be duly registered members of the Paralegal Society of Kenya for accreditation.

The existence of one umbrella body for paralegals in Kenya is a positive step towards building alliances and a unified voice. However, the existing paralegals may have a sense of loyalty to legal aid organizations that they have been closely engaged with. They must therefore be convinced of the cost benefit of membership in the Society. Further, they ought to be reassured that membership in the Society does not translate to separation from their respective mentoring organizations.

Additionally, rule 29(1)(a) requires paralegals to complete a training course approved by the Council of Legal Education. This rule is anchored on section 7 of the Legal Aid Act that provides for the functions of the National Legal Aid Service. Section 7(1)(h) provides that, "in consultation with the Council of Legal Education, develop programs for legal aid, education and the training and certification of paralegals." Further, section 7(1)(o) states that NLAS shall "coordinate, monitor and evaluate paralegals and other legal service providers and give general directions for the proper implementation of legal aid programs."

Currently, training programmes for community-based paralegals are sponsored, short, abridged, flexible and accessible. The training programmes

are informed by the PASUNE curriculum and are conducted in weekly phases with experiential learning under the supervision of advocates. Trainings have been conducted by well seasoned legal aid and empowerment organizations with funding from development partners. The legal aid organizations issue certificates of participation enumerating the areas covered in the training. Also, civic actors may issue badges to trained paralegals to show recognition and nexus with their respective organizations.

On the other hand, the Kenya School of Law runs a Diploma in Law (Paralegal) Studies programme for a period of not less than two (2) years and not more than three (3) years. The programme is full time and fees are payable to the Kenya School of Law. It targets mainly the Kenya Police, Kenya Prisons, the Judiciary, the State Law Office, the Bar and Government departments among other stakeholders. A Diploma certificate is issued by the Kenya School of Law upon successful completion of the examinations.

The legal reforms under the Act introduce the Council of Legal Education as a key actor in training of paralegals. The Council of Legal Education is established under the Legal Education Act No. 27 of 2012 with the primary purpose of:

1) Promoting legal education and training and the maintenance of the highest possible standards in legal education providers; and
2) Provision of a system to guarantee the quality of legal education and legal education providers[24].

The Legal Education Act redefines the Council of Legal Education as a regulator and supervisor of legal education in Kenya and separates the Council from the Kenya School of Law. The latter is a Government agency, established by statute for post-university professional legal training.[25] The Council of Legal Education develops curricula and mode of instruction for legal education programmes, accredits, licenses, monitors and evaluates legal education providers and provides oversight in mode and quality of examinations.

The Legal Aid Act and Legal Education Act disrupt the training programmes for community-based paralegals. Currently, a paralegal training curriculum is being developed by the Council of Legal Education in consultation with the National Legal Aid Service. This is especially problematic as section 18(5)

[24] See section 3 of the Legal Education Act No. 27 of 2012
[25] See the Kenya School of Law Act No.

and (6) of the Legal Education Act invalidates all certification or documentation issued as evidence of an award of a degree, diploma or even certificate in law unless the Council had licensed the programme or training. The licensing procedures of the Council are expensive, rigorous, technical and lengthy. Few legal aid providers will meet the demands for licensing and delivery of the curriculum.

On training, the trade-off involves civic actors replacing their respective training curriculum with that developed by the state agencies. Consequently, the state capture of training of paralegals will result in shrinking space for non-state actors involved in legal empowerment programmes. Stakeholder discussions around the curriculum for paralegalism point to a twenty-six (26) weeks training programme. The length of the proposed training portrays a formalized, rigid and professional qualification. This is a departure from the training programmes on the ground, which are more flexible, customized, accessible and practical in nature. The short-term training programmes are aimed at imparting basic legal knowledge that is responsive to the community needs of the paralegals. The training programme is tailor-made for professional paralegals who may not be keen with community-based services.

Financing presents another critical challenge. The Legal Aid Act establishes the Legal Aid Fund to "defray the expenses incurred by the representation of persons," "pay remuneration of legal aid providers," or "meet the expenses incurred by legal aid providers[26]" The Legal Aid Fund is yet to be operationalized. However, details on how the fund will work in practice are still being negotiated. To ensure adequate financial support for community paralegals throughout the country, civil society has submitted recommendations to the Kenya government suggesting avenues for interagency coordination around legal aid implementation and financing. These recommendations emphasize sustainable measures, as well as systems for assessing community needs and monitoring progress toward the Act's goals.

Finally, paralegals need to be members of an association to be accredited by the National Legal Service. The condition relies on mobilization of paralegals and their organization into associations. At the moment, the only recognized association for paralegals is the Paralegal Society of Kenya. The Society is in the process of recruiting paralegals as members. The presence of a national

[26] See section 30 of the Legal Aid Act.

association for paralegals is crucial for recognition, monitoring and regulation of paralegals. However, the paralegals should have freedom to establish regional associations or devolved units for better representation. Membership in these regional associations should also be recognizable by the National Legal Aid Service.

RECOMMENDATIONS

It is recommended that the legal reforms should be interpreted and implemented taking into consideration the already well-established paralegal movement. Reinventing the will on organizing paralegalism diminishes the huge investment made to organically grow paralegalism. Failure to do so will result in low uptake and compliance of the new regulations. Consequently, the effectiveness of the paralegal approach in addressing access to justice concerns will be minimized due to the existence of two competing, conflicting and parallel forms of paralegalism.

It is important to distinguish professional paralegals and community-based paralegals. There is indeed a place and space for both forms of paralegalism. It is recommended that the law should therefore allow the inclusion and accreditation of community-based paralegals who are mostly human rights monitors within their localities without undue conditions relating to the level of education and form of training.

Further, it is recommended that there is a need to enhance greater and more meaningful participation of community paralegals in effecting the provisions of the Act that relate specifically to paralegalism. The implementation of the Act should not be undertaken within closed spaces of state and non-state actors; decision-making spaces should be open and inclusionary.

There is an urgent need for civic actors to reflect and engage in in-depth discourse on what would constitute recognition and formalization of paralegalism. A good starting point would be more research, learning and sharing of experiences across jurisdictions on the processes, benefits and challenges involved in formalization of paralegalism. Cross-border conversations through legal empowerment networks in Africa and worldwide present platforms for such conversations. A general consensus on preferred models for formalization may then be reached.

CONCLUSION

It cannot be understated that the Legal Aid Act provides opportunities for paralegalism in Kenya especially through formal recognition and acknowledgment of their work and services within the access to justice chain. The challenge lies in the deep state regulation of paralegalism that is then proposed by the Act. Formal regulation will exclude majority of existing community-based paralegals who mainly provide services at grassroots level.

Paralegals were legally acknowledged due to the extensive services they provided prior to the Act. It is imperative that state agencies implement the Act in a manner that takes cognizance of the existing informal framework of paralegalism that evolved organically through the years. Modelling and imposing a “new” framework can only result in conflict and reduced impact of paralegalism.

The law legitimizes and creates a framework for state coordination of a paralegal movement that has initially been essentially community-driven and self-regulatory. It may be imperative for the State to ensure oversight, accountability and coordination of paralegalism. In doing so, the law and state actors should not be expressly or impliedly exclusionary of the “old” and existing local framework on paralegalism. Disregarding community-driven structures of paralegalism will only reverse substantive gains made in legal empowerment efforts in Kenya.

The Efficacy of the Legal Aid Act 2016 in Enhancing Access to Justice

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Abstract

In order to fully realize the potential of access to justice for all, the legislative framework for the provision of legal aid will need to be at its best. This study analyses in detail the legislative framework for the provision of legal aid with a particular focus on the Legal Aid Act 2016(herein the Act). The study examines how effective the Act has been in promotion of access to justice to all. The study begins by discussing the concept of access to justice in general and what it entails, buttressed by various laws, case laws, literature sources and human rights instruments. It goes ahead to discuss the gist of the paper which is the efficacy of the Act in promoting access to justice. This study will therefore critically analyze the Act. It will advance arguments demonstrating how progressive the Act is, but will also advance arguments showing the weaknesses of the Act. All these arguments are advanced in the context of access to justice. In the end, a few recommendations will be outlined in order to cure any mischiefs in the Act. This is the primary objective of this study.

Keywords: Access to justice, Legal Aid Act, Legal Aid Act Analysis, Journal Articles

Introduction

In the wake of regular struggles by various civil society organisations and other relevant stakeholders to adopt a legislative framework for legal aid services, 2016 marked the year of redemption in this field. Finally, the Act was born. This was met with applause by various human rights groups and civil society organizations because it meant that the concept of access to justice for all would no longer be just another paper right.

Indeed, the principal object of the Act is premised on the Constitution of Kenya 2010. The Act is to give effect to Article 19 (2), 48 and 50 (2) (g) and (h) of

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the aforesaid constitution. Article 19(2) focuses on the preservation of the dignity of individuals and communities and promotion of social justice for all. Article 48 has placed a constitutional mandate on the state to ensure access to justice for all. Article 50 (2) (g) has touched on the right of representation and (h) outlines the importance of assigning an advocate to an accused person by the state and at the state's expense.

The act is progressive in various ways as shall be discussed later in detail. However, it might need a few tweaks to fully realise the potential of access to justice for all. As shall be discussed later in detail, the establishment of the National Legal Aid Service (hereinafter *the NLAS*) and the Legal Aid Fund is commendable. The promotion of alternative dispute resolution mechanisms is worth applauding. The act has clearly outlined what legal aid entails and has even gone further to elaborate on who would be eligible for legal aid. All these provisions, this study argues, are instrumental in achieving the objectives of legal aid.

However, this study advances the argument that the Act is in need of various amendments and reforms if the concept of access to justice for all is to be fully realised and integrated. For instance, the Act is characterized with occasional ambiguities and vagueness in its provisions. This, together with various conflicting provisions, might impede the principal object of the Act as such provisions are open to abuse. In addition, the Act aims to promote alternative dispute resolution mechanisms and out of court settlements, but there is still heavy involvement and intervention by the courts in decision making as will be examined later in detail. It is also argued that there is no oversight mechanism for the NLAS in that it is the sole body that makes most decisions. These and other weaknesses of the Act are some of the concerns this study will seek to address.

The Concept of Access to Justice

Article 48 of the Constitution of Kenya 2010 stipulates that 'the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice'. What exactly does 'access to justice' entail?

Justice is a broad concept. It may refer to a situation where people in need of help find effective solutions available from justice systems which are cost-effective, accessible, and which will dispense justice fairly, expeditiously, and

without discrimination, fear or favour.[1] It could also refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice[2]. It may also mean judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue[3]. In addition, it refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge, of legal rights and intimidation by the law and legal institutions[4].

In *Dry Associates Limited v Capital Markets Authority & another*[5]*,* the court's view was that access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems such as formal or informal and affordability of legal services.

The court in *Kenya Bus Service Ltd & another v Minister of Transport & 2 others*[6] further deliberated on the concept of access to justice. It held that access to justice is two-fold. It involves procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for violation of one's rights).

Gargarella[7] posits that the inability of the disadvantaged to access justice in courts is premised on a number of conundrums. These include, inter alia: lack of information, which the author terms as 'legal poverty'; excessive legal formalism; corruption; inordinate delays; and geographical distance. The author argues that the general problem of legal poverty comprises many subsidiary challenges, such as lack of basic knowledge on what rights one is constitutionally entitled to; not knowing what to do in order to vindicate their

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1 Francis Kariuki, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR" (2014) 2(1) *Alternative Dispute Resolution Journal* 210.

2 ibid.

3 ibid.

4 Global Alliance against Traffic in Women (GAATW), available at http://www.gaatw.org/atj/ accessed on 6 December 2020.

5 *Dry Associates Limited v Capital Markets Authority &another* [2012] eKLR in the High Court of Kenya at Nairobi Petition No 328 of 2011.

6 [2012] eKLR.

7 Roberto Gargarella, "Too Far Removed from the People. Access to Justice for the Poor: The Case of Latin America" 1, available at http://www.ucl.ac.uk/dpuprojects/drivers_urb_change/urb_society/pdf_violence_rights/gargarella_removed_from_people.pdf accessed on 6th December 2020.

rights; and the inability to understand the legal language and procedures. Concerning economic challenges, Gargarella argues that the disadvantaged are more likely to be unable to initiate a legal process, let alone carrying it through. The high court fees and the costs of hiring a good lawyer are a heavy burden for them. It is important to note that the absence of a good lawyer drastically reduces the chances of succeeding in a case. Thus, this paper advances the argument that lack of free legal services for the poor is a teething barrier to access to justice. In addition, the author asserts that, within the formalistic and bureaucratic subtleties in the adversarial system, an advocate is likely to perform better if he knows how to exploit the prevailing legal complexities to his or her advantage.[8] These complexities transform justice into something exclusive, reinforcing existing inequalities to the detriment of the disadvantaged. According to Gargarella, these challenges represent significant obstacles for the disadvantaged and greatly obstruct their access to justice.

One of the arguments dominating Gargarella's paper is that the judiciary is far removed from the underprivileged. In his view, most of the aforementioned difficulties exude from the very laws that apply to the poor through the judiciary[9]. Some court decisions may be against the poor not out of the judge's personal prejudice, but because the laws applied are inherently skewed against the poor. Accordingly, judicial reform to provide the underprivileged with better legal representation and impartial judges could still not be a panacea to access to justice. As Garro explains[10], reforms may not shape the rules of law or increase the poor's legal bargaining power. Much broader institutional reforms are required to enhance the poor's access to justice. Gargarella's work is very useful to this study on the barriers to access to justice.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) also demonstrates that all persons are entitled to the right of equal access to justice systems without discrimination[11]. Article 14(1) of ICCPR reads in part:

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8 ibid, (n 4).

9 ibid, (n 9).

10 Alejandro Miguel Garro, 'Access to Justice for the Poor in Latin America' in Mendez Juan E, O"Dornell Guillermo, and Pinheiro Sergio Paulo (eds), *The (Un) Rule of Law and the Underprivileged in Latin America* (Indiana, University of Notre Dame Press 1999) 286-7.

11 International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966 GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) at 52, UN Doc

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Further, this paper argues that an essential prerequisite to a fair legal system and access to justice is the ability to access legal assistance for the purpose of obtaining a fair trial. This was noted by the Human Rights Law Resource Centre (HRLRC)[12]. The authors argue that accessibility of the law depends on the awareness of legal rights and the availability of procedures to enforce such rights. In the absence of legal assistance, meritorious claims or defenses may not be pursued or successful. In its General Comment 32 on Article 14 of ICCPR,[13] the UN Human Rights Committee encouraged states to provide free legal aid to individuals who cannot afford it.

Similarly, in *P, C and S v United Kingdom*[14]*,* the European Court of Human Rights held that the failure to provide a person with an advocate was a violation because, in the circumstances, legal representation was deemed to be necessary. The Court observed that the absence of a lawyer prevented the applicant from articulating their case effectively due to the complexity, high emotional content and serious consequences of the proceedings.

This position was reiterated by Lord Justice Denning in *Pett v Greyhound Racing Association*, who stated that:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "you

A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, retrieved from http://www.refworld.org/docid/3ae6b3aa0.html on 6 December 2020.

12 Human Rights Law Resource Centre, "The Right to a Fair Hearing and Access to Justice: Australia's Obligations" (2009*) Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice*. Human Rights Law Resource Centre Ltd, 6 March 2009, 8, available at http://www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf accessed on 5th December 2020.

13 United Nations Human Rights Committee, *General Comment No 32*, CCPR/C/GC/32, 23 August 2007.

14 *P, C and S v The United Kingdom*, Application No 56547/00 [2002] ECHR 604 (16 July 2002).

> can ask any questions you like;" whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?[15]

Based on this jurisprudence, this paper argues that a person's access to justice should not be curtailed on grounds of inability to afford the cost of independent advice or legal representation. Any failure to provide legal aid to those who are otherwise unable to access an advocate is likely to engender inefficiencies and additional costs in the legal system.

Having analysed the concept of access to justice in detail, this paper will proceed to critically analyse the Legal Aid Act in a bid to demonstrate whether the Act is effective and efficient in the promotion of access to justice.

The Legal Aid Act 2016 and its Efficacy in the Promotion of Access to Justice

As discussed hereinabove, the principle objective of the Act is founded on the provisions of the Constitution of Kenya 2010. This is a progressive provision as it depicts the supremacy of the Constitution and the fact that all other laws have to abide by it.

The Act under section 2 has outlined what legal aid entails. It entails: legal advice; legal representation; assistance in-resolving disputes by alternative dispute resolution; drafting of relevant documents and effecting service incidental to any legal proceedings; and reaching or giving effect to any out-of-court settlement. It also includes: creating awareness through the provision of legal information and law-related education; and recommending law reform and undertaking advocacy work on behalf of the community. This provision is instrumental as it deliberates what entails legal aid in order to promote awareness about it. Awareness ensures that the community has knowledge of how to access justice through legal aid. Whether this list is conclusive and all-encompassing remains to be the question as legal aid may entail many other activities not captured in this provision.

Section 3 has outlined other objects of the Act which entail establishing a legal and institutional framework to promote access to justice by: providing affordable, accessible, sustainable, credible and accountable legal aid

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[15] *Pett v Greyhound Racing Association* (1968) 2 All E.R 545, at 549.

services to indigent persons in Kenya in accordance with the Constitution; providing a legal aid scheme to assist indigent persons to access legal aid; promoting legal awareness; supporting community legal services by funding justice advisory centers, education, and research; and promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution. It is worth noting that these objects of the Act reflect on what entails access to justice as discussed in the previous section. This is a progressive provision as it depicts the intention of the Act as that of promoting access to justice in general.

The Act also outlines the principles that will guide the National Legal Aid Service (an institution which will be discussed shortly) in the performance of its functions and the exercise of its powers.[16] They include: the national values and principles of governance set out in Article 10 of the Constitution; the values and principles of the public service set out in Article 232 of the Constitution; the principles of impartiality, gender equality and gender equity; the principles of inclusiveness and non-discrimination; protection of marginalized groups; the rules of natural justice; and the provisions of any treaty or convention ratified by Kenya, relating to the provision of legal aid.

Part II of the Act establishes the National Legal Aid Service (hereinafter *the Service*)[17]. Section 6 states that the Service 'may establish branches in every county in Kenya to ensure reasonable access of its services.' However it is worth noting that the service has so far established regional offices in a few counties such as Nairobi, Mombasa, Kisumu, Nakuru, Eldoret, Kakamega, Malindi, Kisii, Embu, Machakos, Meru, Nyeri and Garissa. It is hoped that in the years to come, the Service will have established offices in all counties as envisaged by the Act in order to fully realise the potential of access to justice for all.

The service is tasked with various functions, which include to: establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; advise the Cabinet Secretary on matters relating to legal aid in Kenya; encourage and facilitate the settlement of disputes through alternative dispute resolution; undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; take necessary steps to promote public interest litigation with regard

16 Section 4 of the Act.
17 Section 5 of the Act.

to consumer protection, environmental protection and any other matter of special concern to the marginalized groups; provide grants in aid for specific schemes to various voluntary social service institutions, for the implementation of legal aid services; develop and issue guidelines and standards for the establishment of legal aid schemes by Non-Governmental Agencies; in consultation with the Council of Legal Education, develop programs for legal aid education and the training and certification of paralegals; promote, and supervise the establishment and working of legal aid services in universities, colleges and other institutions; (j)promote the use of alternative dispute resolution methods; take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws; facilitate the representation of persons granted legal aid under this Act; assign legal aid providers to persons granted legal aid under this Act; establish, coordinate, monitor and evaluate justice advisory centers; coordinate, monitor and evaluate paralegals and other legal service providers and give general directions for the proper implementation of legal aid programs and ; administer and manage the Legal Aid Fund.

The promotion of alternative dispute resolution (ADR) mechanisms as a function of the service is certainly a progressive provision as it facilitates access to justice for all. This means that people no longer have to contend with high court fees in order to have their cases heard. In fact, the act has defined ADR to mean 'settling of a dispute by means other than through the court process and includes negotiation, mediation, arbitration, conciliation and the use of informal dispute resolution mechanisms[18]. This provision presents an important platform for the indigent to access justice.

Important to note however is the function of the service to develop programs for legal aid education. Whilst various universities are now participating in legal aid, this paper argues that legal aid education needs to be addressed more. There is a need to instill this education as a core unit in the legal curriculum. It is important that students understand early enough what legal aid is all about. Such education will form an instrumental foundation for the provision of legal aid services to the community. It means that students and other actors alike will be well trained in this field and will be equipped with basic knowledge and skills in this arena. This will definitely boost the chances of providing efficient legal aid services to the beneficiaries, thereby promoting access to justice for all.

[18] Section 2 of the Act.

The provision that the service shall 'perform such other functions as may be assigned to it under this Act or any other written law' is a cautious approach by the drafters of the Act as it demonstrates that the activities of the service can never been conclusive in an ever-evolving legal field.

Part V establishes the Legal Aid Fund (hereinafter *the fund*).[19] The Fund consists of moneys allocated by Parliament for the purposes of the Service; any grants, gifts, donations, loans or other endowments given to the Service; such funds as may vest in or accrue to the Service in the course of the exercise of its powers or the performance of its functions under this Act; and moneys from any other lawful source accruing to the Fund. The Service may use the monies of the Fund to: defray the expenses incurred in the representation of persons granted legal aid; pay the remuneration of legal aid providers for services provided in accordance with the Act; meet the expenses incurred by legal aid providers in providing services under the Act; and meet the expenses of the operations of the Service as approved by the Board. This is vital provision as it ensures that at all times, the service is well funded to ascertain the smooth performance of its operations in helping the indigent access justice.

The Act goes on to stipulate that the Service shall provide legal aid services at the expense of the State to persons who qualify for legal aid services under the Act[20]. In fact, it is the duty of the service to establish a cost effective and efficient system for providing high quality legal services within the financial resources available to the service[21] The fact that the services are at the expense of the state should encourage anyone who may not be able to afford legal services that all hope is not lost. Indeed, the Service provides legal aid services in civil matters; criminal matters; children matters; constitutional matters; matters of public interest; or any other type of case or type of law that the Service may approve[22]. This is an important provision as it shows that regardless of the nature of the case one has, one is in good hands when it comes to accessing legal aid from the service.

Section 36 has outlined the persons eligible for legal aid. Such a person should be indigent, resident in Kenya; a citizen of Kenya; a child; a refugee

19 Section 29 of the Act.
20 Section 35(1) of the Act.
21 Section 35 (4) of the Act.
22 Section 35(2) of the Act.

under the Refugees Act; a victim of human trafficking; or an internally displaced person; or a stateless person.

The service shall not provide legal aid services to a person unless the service is satisfied that the claim in respect of which legal aid is sought has a probability of success[23]. This poses a great risk to the concept of access to justice because it's directing the service to be choosy with the kind of cases they should handle based on merit. Ordinarily, lawyers are required to handle a client's case regardless of their private opinions as to its credibility or merits and should vigorously seek to defend client's rights to obtain a favorable outcome[24]. Lawyers should not assume the role of judges and pick cases which they think have merit. To do so would be to limit access to justice to specific individuals whose cases seem 'favorable'. It is argued that this provision should be amended so as to achieve the objective of the Act which is to ensure access to justice for all.

Furthermore, section 37 has stipulated that legal aid will not be available in certain civil matters. The Service shall not provide services: to a company, corporation, trust, public institution, civil society, Non-Governmental Organization or other artificial person; in matters relating to tax; in matters relating to the recovery of debts; in bankruptcy and insolvency proceedings; and in defamation proceedings. This provision may be a little problematic since it is unclear why legal aid services does not extend to such cases. It also therefore means that the concept of access to justice for all is not 'for all' per se.

The act also stipulates that 'the officer-in-charge of a prison, police station, remand home for children or other place of lawful custody shall ensure that every person held in custody, is informed, in a language that the person understands, of the availability of legal aid on being admitted to custody and is asked whether he or she desires to seek legal aid. Whether this provision is obeyed in practice is a different story altogether, but this paper commends the provision for providing a means through which even the accused are made aware of their right to seek legal aid. Awareness of one's rights is such a fundamental principle of access to justice.

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23 Section 36 (4) (e).

24 This is a requirement under the Law Society of Kenya (LSK) Code of Standards of Professional Practice and Ethical Conduct (SOPPEC) of June 2016 under SOPPEC 8, paragraph 131.

Moreover, the Act states that a court before which an unrepresented accused person is presented shall inform the service to provide legal aid to the accused person. This is a progressive provision as it obeys the principle of the right to representation which is one of the foundations upon which the Act is premised[25]. However, a conflicting provision presents itself in Section 43 (6) which stipulates that 'despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.' This provision, this paper argues is not only conflicting but also ambiguous as to the intention of the drafters. It is unclear why the Act would emphasize the importance of representation to an accused person and yet still go ahead to declare that such representation is inconsequential when it comes to proceedings in court. Such ambiguities are open to abuse and mischief by relevant actors and this will definitely occasion grave injustice to an accused person. This provision, this paper argues, is an outright negation of the very objectives the Act has set out to achieve- the objective to ensure access to justice for all by ensuring the right to representation is enjoyed by an accused person.

Indeed, the Act even goes ahead to stipulate that the service may refuse to grant legal aid to an applicant[26]. This paper notes that the Act has specified persons eligible for legal aid and cases excluded from legal aid services. However, the drafters should have done more than briefly outlining such a provision. No criteria for such a refusal have been put in place by the Act and therefore the provision remains open to a lot of abuse and misinterpretation. This paper recommends that the provision is made more specific to avoid mischief.

Section 44 (7) stipulates that 'where the Service does not grant legal aid to an applicant, the Service shall send a written notice to the applicant stating the reasons for refusal to grant legal aid; and the right to seek review of the decision of the Service and of appeal to the High Court.' This provision presents two legal issues. First, is the fact that one seeks review from the decision maker, which is the service. This is problematic as the same institution that makes the decision is being empowered to review its own decision. There couldn't be a better illustration of conflict of interest. This problem is also present in section 49 (1), Section 66 (4) and Section 67 (4) of the Act. It is suggested that an independent institution is chosen to review the

[25] Section 43 (1) (c).
[26] Section 44 (1) (c) of the Act.

decisions of the Service in order to ascertain impartiality in the process of promoting access to justice.

Secondly, is the involvement of the court in appeals. This issue is also prevalent in Section 55 which states that 'an applicant, an aided person or a legal aid provider who is aggrieved by a decision of the Service may appeal to the High Court within thirty days of the decision.' The thought of an indigent person having to pay court fees to appeal a decision of the service may not sit well with those advocating for access to justice for all. This paper does not in any way advance the argument that the appellate courts should be stripped of their jurisdiction, but however proposes that an alternative out of court process is used to hear appeals particularly for the indigent persons who cannot afford court fees.

Section 69 (1) also provides that an aided person who receives legal aid shall pay a fee of such amount as may be determined by the Service. This provision is quite ambiguous as to the specific amount payable. It offers a wide discretion to the service as to determine such fees and this may be subject to abuse. There is need to specify the amounts payable and make such amounts known to the public as a way of obeying the principle of transparency.

Section 72 (1) of the Act is a progressive provision. It stipulates that 'If an aided person receives legal aid for civil proceedings and loses the case, the court shall not award an order of costs against the aided person, unless there are exceptional circumstances. The words 'unless there are exceptional circumstances may offer a bit of an ambiguity, but this provision provides a safety net for the indigent persons who may not be able to afford to pay for such costs.

Section 79 of the Act offers conflicting provisions. It stipulates that 'an aided person shall not be required to make any payment in connection with the provision of services, except where it is otherwise provided.'[27] It goes ahead to state that an aided person may be required to pay for: the cost of services; a contribution in respect of the services; administration costs; and any other service provided to the aided person. The last provision 'any other service' is not only conflicting with section 79(1) but is also ambiguous and open to abuse. 'Any other service' could mean anything and such a provision poses a huge risk for mischief, in that any service might be charged as 'any other service'. Such provisions may impair the ability of the service to ensure

[27] Section 79(1) of the Act.

access to justice for all as the fees may be too exorbitant for an indigent person.

It is worth noting that the service has come up with legal aid regulations known as The Legal Aid (General) Regulations, 2020 that have bolstered some of the provisions of the act. For instance, they provide for criteria for accreditation of legal aid service providers, criteria for eligibility for legal aid, payment for legal aid services among other provisions. These regulations have not been a part of the discussion entrenched in this paper as this study had a particular focus on the Act. However, it is commendable that the service has delivered on its promise of formulating the regulations. This is an instrumental step in the journey to achieving access to justice for all.

Conclusion

This paper has critically analysed the efficacy of the Legal Aid Act in promoting access to justice. It began by examining the concept of access to justice in detail while using case law and various literature sources to buttress the arguments. The paper determined that the concept of access to justice is broad and entails various components such as the right to representation and affordable legal services. The paper went ahead to critically analyse the Act. Some provisions were found to be progressive in promoting access to justice. Others were marred by ambiguities and conflicts.

This paper recommends thus those various amendments are needed to cure any mischiefs discussed hereinabove. To crown it all, the government should ensure efficient implementation mechanisms are put in place to fully realise the objectives of the Act. All in all, the Act is a positive step in the right direction towards achieving access to justice for all.


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